TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~267.~~ 20

ISAAC N. SWAIN, APPELLANT,

vs.

STEPHEN H. SEAMANS, CATHARINE M. STEPHENS, AND EDWARD P. WHALING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED AUGUST 13, 1867.

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No. 257.

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1 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the seventh circuit and district of Wisconsin, begun and held according to law, on the first Monday of January, A. D. 1867, at the city of Madison, in said district of Wisconsin, present and presiding, the Hon. Andrew G. Miller, district judge, on the sixth day of the term, to wit, on the fifth day of March, A. D. 1867, the following proceedings were had, to wit:

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN.
} In equity.

Be it remembered, that heretofore, to wit, on the sixth day of July, A. D. 1863, the above-named defendant, a citizen of the State of Michigan, by his counsel, Messrs. Finches, Lynde & Miller, presented to the court copies of the process and proceedings in this cause, certified from the office of the clerk of the circuit court for the county of Milwaukee, within this district, together with a copy of the bond of the defendant for the removal, and of the order of said court for the removal of the cause to this court, under section twelve of the act of Congress to establish the judicial courts of the United States, as follows, to wit:

2 Circuit court, county of Milwaukee.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN.

[Stamp.]

State of Wisconsin to Isaac N. Swain:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on us, at the office of N. C. Gridley, in the city of Milwaukee, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, within the time aforesaid, the plaintiffs will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Arthur McArthur, judge of the circuit court for the county of Milwaukee, this 21st day of April, in the year one thousand eight hundred and sixty-three.

MATT. H. CARPENTER, and
N. C. GRIDLEY,
Plaintiffs' Attorneys.

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2 Circuit court, county of Milwaukee.

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vs.
ISAAC N. SWAIN.

[Stamp.]

State of Wisconsin to Isaac N. Swain:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on us, at the office of N. C. Gridley, in the city of Milwaukee, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, within the time aforesaid, the plaintiffs will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Arthur McArthur, judge of the circuit court for the county of Milwaukee, this 21st day of April, in the year one thousand eight hundred and sixty-three.

MATT. H. CARPENTER, and
N. C. GRIDLEY,
Plaintiffs' Attorneys.

3 Circuit court, county of Milwaukee.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.

Complaint.

The plaintiffs above named, by Matt. H. Carpenter and N. C. Gridley, their attorneys, complain of the above-named defendant, who is a non-resident of this State, and resides at Detroit, in the State of Michigan, and for cause of action respectfully shows to this court: That they are owners in fee of those certain pieces, parcels, or lots of land situate and lying in the second ward of the city of Milwaukee, and State of Wisconsin, and known and described as lots nine, ten, and south five feet, extending the same width from front to rear of lot eight, in block thirty-two, together with the following mill situated thereon, known as the "Empire Mill."

And the said plaintiffs further show to this court, and allege upon information and belief, that on or about the 14th day of April, 1855, the said defendant, Isaac N. Swain, sold and conveyed to John W. Medbury and James F. Aldrich a large amount of real estate, situate and lying in the county of Berrien and county of Van Buren, in the State of Michigan, for the consideration of fifty-two thousand four hundred dollars, of which amount ten thousand dollars was paid in cash, and the balance of forty-two thousand four hundred dollars was *was* secured by a mortgage upon said lands, payable in instalments at different times, and which said mortgage was duly recorded as required by the laws of said State of Michigan.

And the said plaintiffs further show to this court, and *and* allege, upon information and belief, that the said John W. Medbury, then being the owner of an undivided one third part of the lots of land and mill as aforesaid, on the day and year aforesaid, executed and delivered to the said defendant the mortgage, and the said defendant executed and delivered to the said John B. Medbury the agree-

4 ment, as follows, to wit:

This indenture, made the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, between John W. Medbury and Mary R. Medbury, his wife, of the city of Milwaukee, in the State of Wisconsin, party of the first part, and Isaac N. Swain, of Racine county, in the State of Michigan, party of the second part:

Whereas, the said party of the first part, with James F. Aldrich, is justly indebted to the said party of the second part in the sum of forty-two thousand and ~~five~~ hundred dollars, and interest from the 28th day of September, 1854, agreed and secured to be paid by a certain bond and mortgage, executed by said parties of the first part and said James F. Aldrich, and his wife, to said party of the second part, bearing even date herewith, to secure a part of the purchase money for the premises described in said mortgage:

Now, therefore, this indenture witnesseth: That the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the terms and effect of the said bond and mortgage above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever, all of that undivided one-third of all these certain pieces, parcels, or lots of land, situate, lying, and being in the city of Milwaukee aforesaid, and upon which lots is situate and being the flouring mill known as the "Empire Mills," owned and occupied by said John W. Medbury and Martin B. Medbury; and that the said parties of the first part hereby covenant to and with said party of the second part, that said premises above described are free and clear of all incumbrances previous to this indenture: To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and also all the estate, interest, and claim whatsoever, in law as well as in equity, which the party of the first part have in and to the premises hereby conveyed unto said party of the second part, his heirs and assigns, and to their only proper use, benefit, and behoof: Provided, always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time, and in the manner specified in the above-mentioned bond and mortgage, executed by the said parties of the first part, and said James F. Aldrich and his wife, to the said party of the second part, bearing even date herewith, etc., as aforesaid, according to the true intent and meaning thereof, then, and in that case, these presents, and everything herein expressed, shall be absolutely null and void.

In witness whereof, the said parties of the first part hereunto have set their hands and seals the day and year first above written.

(Signed) JOHN W. MEDBURY. [SEAL.]
MARY R. MEDBURY. [SEAL.]

Sealed and delivered in presence of—
WILLIAM WALLACE STEWART.
N. LANDON, Jr.

The words with James F. Aldrich interlined in eight line before execution hereof.

STATE OF ILLINOIS, *Cook county, ss:*

Be it remembered, that on this fourteenth day of April, A. D. 1855, before the subscribed, a commissioner in and for said State, appointed by the governor of the State of Wisconsin, to take acknowledgment and proof of the execution of deeds or other conveyances,

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and leases, and of any contracts, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions, to be used and recorded in the said State of Wisconsin, appeared John W. Medbury, and Mary R., his wife, described in and who executed the foregoing instrument of writing between them, as
6 one of the parties thereto, and Isaac N. Swain, who is the other party thereto, and the said Medbury and wife acknowledged that they executed the said instrument freely for the purpose therein stated; and the said Mary R. Medbury, wife of J. W. Medbury, on being made acquainted with the contents thereof by me, and in a private examination apart from her husband, acknowledged that she executed the said instrument of writing freely, and without any fear or compulsion of said husband, or any other person. And I further certify, that I know the persons who made the said acknowledgment are the identical persons described in and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city of Chicago, the day and year first above written.

[SEAL.] WM. WALLACE STEWART,
Commissioner of Deeds.

It is hereby stipulated and agreed by the said party of the second part within named, that if within two years from this date the large said mill of fifty by one hundred feet in size, shall be properly built and completed upon the foundation commenced last fall by driving piles which is on the premises, described in said mortgage mentioned as being executed by the said John W. Medbery and James F. Aldrich, and their wives, to accept in place of the within mortgage security in proper fire insurance policy or policies on said large saw mill, and thereupon to discharge the within mortgage; to which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself, his heirs, executors, administrators, and assigns.

Dated April 14, 1855.

ISAAC N. SWAIN. [SEAL.]

In presence of—
WILLIAM WALLACE STEWART.
H. LANDON, Jr.

STATE OF ILLINOIS, *Cook county, ss:*

7 Be it remembered, that on this 14th day of April, 1855, before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds and other conveyances, or leases, and of any contracts, letter of attorney, or other writing, under seal or not, administer oath, and take and certify depositions, to be used and recorded in the said State of Wisconsin, appeared Isaac N. Swain, who is described in and who executed the written and foregoing instrument of writing between him, as one of

the parties thereto, and John W. Medbury, and Mary R. Medbury, his wife, the other party thereto; and the said Isaac N. Swain acknowledged that he executed the said instrument freely for the purpose as therein stated. And I further certify, that I know the person who made the said acknowledgment is the identical person described in and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city of Chicago, the day and year first above written.

[SEAL.] WM. WALLACE STEWART,
Commissioner of Deeds.

And the said plaintiffs further show to this court, and allege, upon information and belief, that the aforesaid mortgage and agreement were executed cotemporaneously, and upon the same sheet of paper. and were recorded together in the office of the register of deeds of the county of Milwaukee, on the 21st day of April, 1855, in vol. 30 of mortgages, on page 12, etc., as by reference to said mortgage and agreement will more fully and at large appear.

And the said plaintiffs further show to this court, and allege, that subsequent to the execution of the mortgage and agreeement aforesaid the said John W. Medbury and wife, by good and sufficient deed of warranty, duly sold and conveyed their interest in and to the lots and mill aforesaid, and that these plaintiffs subsequently became, and are now the owners of said lots and mill aforesaid, and the said S. H. Seamens of an undivided one-half part thereof, the said E. P.
8 Whaling of an undivided one-fourth part thereof, and the said Catherine M. Stevens, who is the wife of George C. Stevens, of an undivided one-fourth part thereof, and upon the understanding and upon the representattion of the said John W. Medbury, that the said mortgage and agreement was fully performed and the same was fully satisfied, and that he could and would procure a satisfaction thereof of record.

And the said plaintiffs further show to this court, and allege, upon information and belief, that the said John W. Medbury fully kept and performed all the conditions on his part to be kept and performed, and specified in the agreement attached to the mortgage.

And the said plaintiff further shows to this court, and alleges upon information and belief, that the said defendant has received, and there has been paid to said defendant in cash upon the mortgage herein first above described, since the execution and delivery thereof, the sum of about twenty-two thousand dollars, and that the said Medbury and Aldrich expended upon the lands and premises described in said mortgage, in improvements, upwards of forty thousand dollars, paying for the building of said mill, specified in the agreement aforesaid, upwards of twenty thousand dollars; that the said defendant, by reason of the non-payment of certain instalments due, and payable as specified in said mortgage first above described, caused said mortgage to be foreclosed in the circuit court of Berrier county, State of Michigan, and obtained a decree for the sale of said

lands and premises, and under which said decree there was claimed to be due on the 15th day of April, 1863, the sum of about twenty-two thousand dollars, and that on that day the said land and premises were sold under and in pursuance of said decree; and the said defendant, or some person on behalf of the said defendant, became the purchaser of the whole of the land and premises described in said mortgage, together with all the improvements situate and being thereon as aforesaid, including the said mill, at the sum of nineteen thousand, and that the said premises, with the improvements thereon, were actually worth, at the time of said sale, at least the sum of fifty thousand dollars.

9 And the said plaintiff further shows to this court, and alleges, that prior to the commencement of this action, there did cause to be, and there was made on behalf of the said plaintiff, or some one or more of them, on the 18th and 27th days of February, 1863, at Detroit, in the State of Michigan, a demand upon the said defendant to execute and deliver to the said plaintiffs a satisfaction of the mortgage executed by the said John W. Milbury and wife, and thereinbefore fully set forth, and at the same times and place there was offered and tendered to the said defendant the sum of three dollars in lawful money of the United States, to pay the necessary expenses, and which amount was sufficient therefor, for the due and proper execution and acknowledgment of said satisfaction of mortgage, and that there was also exhibited and tendered, at the time and place aforesaid, to the said defendant, a written form of satisfaction of said mortgage, and that the said defendant did then and there absolutely refuse to execute or acknowledge satisfaction of said mortgage, to the great damage of the said plaintiff; whereupon, the said plaintiffs pray for the judgment of this court, directing that the mortgage made and executed by John W. Medbury and Mary R. Medbury, his wife, to the said Isaac N. Swain, bearing date the 14th day of April, A. D. 1855, and recorded in the office of the register of deeds of the county of Milwaukee, State of Wisconsin, vol. 30 of mortgages, and page 12, etc., be cancelled and discharged of record, and for such other or further order, judgment, or relief, as shall be just and equitable.

MATT. H. CARPENTER, and
N. C. GRIDLEY,
Plaintiffs' Attorneys.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Edward P. Whaling being duly sworn, says he is one of the plaintiffs above named, and that the foregoing complaint is true of his own knowledge, except as to these matters therein stated on information and belief, and as to these matters he believes it to be true.

EDWARD P. WHALEY. Whaling

10 Subscribed and sworn to before me, this 23rd day of April, A. D. 1863.

DUNCAN. E. CAMERON.
Notary Public of Milwaukee Co., Wis.

Circuit court, Milwaukee county.

STEPHEN H. SEAMANS, CATHARINE M. Seamans & Edward P. Whaling,
against
ISAAC N. SWAIN.

Please take notice that we have been retained for the defendant Isaac N. Swain, in the above-entitled cause, and appear for him therein.

Yours, &c.
FINCHES, LYNDE & MILLER,
Atty's for Defendant.

To MATT. H. CARPENTER & NELSON GRIDLEY, Esqrs.
Atty's for Plaintiffs.

Endorsed: We hereby admit service of a copy of the within notice and demand. May 16, 1863.

MATT. H. CARPENTER,
N. C. GRIDLEY,
Pl'ffs' Att'ys,

Circuit court, Milwaukee county.

STEPHEN H. SEAMANS, CATHARINE M. Stevens, and Edward P. Whaling,
agst.
ISAAC N. SWAIN.

11 Please take notice, that upon the notice of retainer and appearance of the defendant, the petition of the defendant, Isaac N. Swain, and the bond of Isaac N. Swain, Edward H. Brodhead, and Hoel H. Camp, and this summons and papers in the cause, the defendant, Isaac N. Swain, will move the circuit court for the county of Milwaukee, at the court-house in the city of Milwaukee, on Saturday, the 23rd of May, inst., at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that the above-entitled cause be removed to the circuit court of the United States for the district of Wisconsin, and that all proceedings in said circuit court for Milwaukee county be stayed in accordance with the prayer of said petition.

Yours, &c.,
FINCHES, LYNDE & MILLER,
Atty's for Defendant.

To MATT. H. CARPENTER and NELSON GRIDLEY,
Att'ys for Pl'ffs.

Endorsed: "We hereby admit service of a copy of within notice of motion.
May 16, '63.

MATT H. CARPENTER, and
N. C. GRIDLEY,
Pl'ffs' Atty's.

Know all men by these presents, that we, Isaac N. Swain as principal, and Edward H. Brodhead and Hoel H. Camp, as sureties, are held and firmly bound unto Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Stephen H. ~~Stevens~~, Catharine M. Stevens, and Edward P. Whaling, or to their certain attorneys, executors, administrators, or assigns, to which payment, well and truly made, we bind ourselves, our and each of our heirs, executors, and administrators, and each of them, firmly by these presents, sealed with our seals, and dated this fourteenth day of May, A. D. 1863.

12 Whereas, the above-named Stephen H. Seamans, Catharine M. ~~Seamans~~, and Edward P. Whaling, have commenced a suit in the circuit court for Milwaukee county, against the above-named Isaac N. Swain; and whereas, the said Isaac N. Swain is about to file his petition to the judge of said circuit court for Milwaukee county, praying for a removal of said cause to the circuit court of the United States for the district of Wisconsin, in pursuance of an act of Congress in such cases made and provided;

Now, therefore, the condition of this obligation is such, that if the above-named Isaac N. Swain shall enter in the said circuit court of the United States for the district of Wisconsin, on the first day of its session, copies of said process against him; and also, that he will then appear and put in special bail, if specially bail was originally requisite therein, then this obligation shall be void, else valid.

[L. S.] ISAAC N. SWAIN.
[L. S.] EDWARD H. BRODHEAD.
[L. S.] H. H. CAMP.

Signed, sealed, and delivered in presence of—
B. K. MILLER.
SAM. DALE, JR.

STATE OF WISCONSIN,
Milwaukee County, ss:

Edward H. Brodhead, being duly sworn, says he is a freeholder, residing in the State of Wisconsin, and is worth the sum of one thousand dollars over and above all debts, set-offs, and exceptions.

EDWARD H. BROADHEAD.

Subscribed and sworn to before me, this 14th day of May, A. D. 1863.

SAM. DALE, JR.,
Notary Public, Mil. Co., Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

13 Hoel H. Camp, being duly sworn, says he is a freeholder, residing in the State of Wisconsin, and is worth the sum of

one thousand dollars over and above all debts, set-offs, and exceptions.

H. H. CAMP.

Subscribed and sworn to before me, this 14th day of May, A. D. 1863.

SAM'L DALE, JR.,
Notary Public, Mil. Co., Wis.

Endorsed: "We hereby admit service of a copy of within bond; May 16, 1863.

MATT. H. CARPENTER, and
N. C. GRIDLEY. *Pl'ffs' Att'ys.*

Circuit court, Milwaukee county.

STEPHEN H. SEAMANS, CATHARINE M. Stevens, and Edward P. Whaling,
agst.
ISAAC N. SWAIN.

To the circuit court of Milwaukee county:

The petition of the above-named Isaac N. Swain, respectively shows unto this honorable court, that the above-named Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, have commenced a suit against your petitioner in the circuit court of Milwaukee county, State of Wisconsin, and which suit is now pending in said court.

And your petitioner further shows and alleges, that the said Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are citizens and residents of the State of Wisconsin, and that your petitioner is a citizen and resident of the State of Michigan.

And your petitioner further shows and alleges, that the mat-
14 ter in dispute in said above-entitled cause, in which the said Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are plaintiffs, and your petitioner, the said Isaac N. Swain is defendant, exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further shows and alleges, that he is now ready and willing, and hereby offers good and sufficient security for his entering in the circuit court of the United States, in and for the district of Wisconsin, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause if special bail was originally requisite therein.

Your petitioner, Isaac N. Swain, therefore prays, that the said above-entitled cause, wherein the said Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are plaintiffs, and your petitioner is defendant, may be removed to the circuit court of the United States for the district of Wisconsin, and that all proceedings in said cause in the circuit court of Milwaukee county, shall be stayed, and your petitioner will ever pray, &c.

ISAAC N. SWAIN.
FINCHES, LYNDE & MILLER.
Att'ys for Isaac N. Swain.

STATE OF WISCONSIN,
Milwaukee County, ss:

Isaac N. Swain, being duly sworn, deposes and says that he is the above-named petitioner; that he has heard read the foregoing petition, subscribed by him, and knows the contents thereof, and that the same is true, in substance and in fact, according to the best of his information and belief.

ISAAC N. SWAIN.

Subscribed and sworn to before me, this 14th day of May, 1863.
SAMUEL DALE, JR.,
Notary Public, Mil. Co., Wis.

15 Endorsed: "We hereby admit service of a copy of within petition.
" MATT. H. CARPENTER,
" N. C. GRIDLEY,
" Pl'ff's Att'y."

County of Milwaukee.

STEPHEN H. SEAMENS, CATHARINE M. STEVENS, and Edward P. Whaling,
agst.
ISAAC N. SWAIN.

COUNTY OF MILWAUKEE, *ss:*

Nelson C. Gridley, being duly sworn, says that he is one of the attorneys of the plaintiffs above named, and that said action is brought for the purpose of obtaining the satisfaction and cancelling of records of a certain mortgage upon real estate, situate in said county of Milwaukee, and executed by one John W. Medbury and wife, to the said defendant; that the said defendant is a non-resident of this State, and resides at Detroit, in the State of Michigan; that a copy of the summons and complaint in this action was filed in the office of the clerk of this court on the 24th day of April, A. D. 1863, and that the said defendant is a necessary and proper party to this action, and has or claims to have an unsatisfied interest in and to the mortgage aforesaid.

N. C. GRIDLEY.

Subscribed and sworn to before me, this 24th day of April, 1863.
J. V. V. PLATTO,
Notary Public.

It appearing to my satisfaction, from the foregoing affidavits, that Isaac N. Swain, defendant, in the above-entitled action, is a necessary and proper party to said action, which relates to real property within this State, and that he is a non-resident of this State, and resides at Detroit, in the State of Michigan, I do hereby order that the

summons in this action be published in the "Daily Milwaukee News," a daily newspaper published in the city of Milwaukee, in said
16 county, andbeing the newspaper most likely to give notice to the said defendant, once in each week, for the period of six weeks, and that a copy of the summons and complaint in this action, be forth with deposited in the post-office, directed to the said Isaac N. Swain, at Detroit, Michigan, or that personal service of copies of said summons and complaint be made upon the said defendant.

Dated April 24th, A. D. 1863.

R. N. AUSTIN,
Court Commissioner.

Circuit court, Milwaukee county.

STEPHEN H. SEAMENS, CATHARINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.

COUNTY OF MILWAUKEE, *ss:*

Nelson Gridley, being duly sworn, says that at the time of the commencement of this action, the said plaintiff, Stephen H. Seamans was, and is now, a citizen of the State of Illinois.

And this deponent further says, that the notice of motion, on behalf of the defendant, to remove this action to the circuit court of the United States, was served on this deponent on the 16th day of May, 1863, less than eight days prior to day named for the hearing of said motion.

N. C. GRIDLEY.

Subscribed and sworn to before me, this 28th day of May, A. D. 1863.

W. L. CLEAVER,
Dep. Clerk.

[5 c. int. rev. stamp.]

17 April term, 1863.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.
Carpenter & Gridley, relief.

APRIL 24, 1863.

And now comes the plaintiff, by Carpenter and Gridley, their attorneys, and file their summons and complaint. May 18, 1863, notice of retainer filed as follows: Please to take notice that we have been retained for the defendant, Isaac N. Swain, in the above-entitled cause, and appear for him therein.

Yours, &c.
FINCHES, LYNDE, and MILLER,
Atty's for Defendant.

To MATT. H. CARPENTER and NELSON C. GRIDLEY, Esq.,
Atty's for Plaintiff.

Endorsed: We hereby admit service of a copy of the within notice and demand, May 16, 1863. Matt. H. Carpenter, N. C. Gridley, pl'ff's att'ys.

Same time, notice of motion for change of venue filed.

Endorsed: "We hereby admit service of a copy of within notice of motion, May 16, 1863. Matt. H. Carpenter and N. C. Gridley, pl'ff's att'ys.

Same time, bond for costs filed; same time, petition for removal of action to the circuit court of the United States in and for the district of Wisconsin, filed May 25, 1863. Affidavit N. C. Gridley, filed; same time, order filed as follows:

It appearing to my satisfaction, from the foregoing affidavit, that Isaac N. Swain, defendant in the above-entitled action, is a necessary and proper party to said action, which relates to real property within the State, and that he is a non-resident of this State, and resides at Detroit, in the State of Michigan, I do hereby order that the summons in this action be published in the "Daily Milwaukee News," a daily newspaper published in the city of Milwaukee, in said county, and being the newspaper most likely to give notice to the said defendant, once in each week, for the period of six weeks, and that a copy of the summons and complaint in this action be forthwith deposited in the post office, directed to the said Isaac N. Swain, at Detroit, Michigan, or that personal service of copies of said summons and complaint be made upon the said defendant, dated April 24th, A. D. 1863.

K. N. AUSTIN,

18 *Court Commissioner.*

MAY 25, 1863.

And now comes the defendant, by Finches, Lynde, and Miller, his attorneys, and on reading petition, bond, &c., filed herein, moves the court for an order removing this cause to the circuit court of the United States for the district of Wisconsin. The plaintiffs appearing by Carpenter and Gridley, their attorneys; and on reading and filing affidavit of N. C. Gridley, opposing said motion, and the same being argued and submitted, the court takes time, &c.

JUNE 22, 1863.

And now at this day, the court being well and sufficiently advised of and concerning said motion to remove cause, &c., it is ordered by the court that said motion be, and hereby is, allowed, and that the place of trial of this action be, and hereby is, removed to the United States circuit court for the district of Wisconsin; and the clerk of this court is hereby directed to deliver to the clerk of said United States circuit court, certified copies of all papers on file, and of the docket entries in this action, with all convenient speed.

State of Wisconsin, circuit court.

STEPHEN H. SEAMANS AND OTHERS
aginst.
ISAAC N. SWAIN.

MILWAUKEE COUNTY, *ss:*

I, D. McDonald, clerk of said court, do hereby certify that I have compared the foregoing copies "summons, complaint, notice of retainer, notice of motion, bond, petition for removal of action, affidavit, and order of publication, and affidavit to oppose motion to remove cause" with the originals now on file in my office; that said copies are true and correct transcripts of the originals and of the endorsements of said originals, and that the copy of docket entries hereto annexed is a true and correct transcript of the docket entries of said cause, as the same remains of record in my office; and I further certify that said copies, above described, are copies of all the papers on file in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 27th day of June, A. D. 1863.

[L. S.] D. McDONALD, *Clerk.*

[Stamp.]

19 And also entered his appearance by his said solicitors, Messrs. Finches, Lynde, and Miller.

Whereupon, it is ordered by the court, that this cause be entered upon the docket of this court, and be proceeded in, in the same manner as if it had been brought here by original process; and by consent it is ordered by the court that the complainants have until the first Monday, of August next, to file a new bill of complaint.

SEPTEMBER 7, 1863.

This day came the complainants, by their solicitor, Mr. Gridley, and filed their bill of complaint, in the words and figures following, to wit:

20 Circuit court of the United States in and for the district of Wisconsin,—In equity.

Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, who are citizens of the State of Wisconsin, bring this their bill against Isaac N. Swain, a citizen of the State of Michigan.

And thereupon, your orators complain and say, that at the time of the commencement of this suit in the circuit court in and for the county of Milwaukee, State of Wisconsin, and prior to the removal thereof to this court, your orators were the owners of those certain pieces, parcels, or lots of land, situate and being in the second ward of the city of Milwaukee, in said district, and known and described as lots nine, ten, and the south five feet, extending the same width,

from front to rear of lot eight in block twenty-two, with the flouring mills situate thereon, known as the "Empire Mill."

And your orator further show unto your honors, that on or about the 14th day of April, 1855, the said defendant, Isaac N. Swain, sold and conveyed to John W. Medbury and James F. Aldrich, a large amount of real estate, situate and lying in the county of Berrien, and county of Van Buren, in the State of Michigan, for the consideration of fifty-two thousand four hundred dollars, of which amount, ten thousand dollars was paid in cash, and the balance of forty-two thousand four hundred dollars was secured by a mortgage upon said lands payable in installments at different times, and which said mortgage was duly recorded as required by the laws of the State of Michigan.

And your orators further show unto your honors, that the said John W. Medbury being the owner of an undivided one-third part of the lots of land and mill aforesaid, on the day and year aforesaid, executed and delivered to the said defendant the mortgage, and the said defendant executed and delivered to the said John W. Medbury, the agreement as follows, to wit:

This indenture, made the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, between
21 John W. Medbery and Mary R. Medbery, his wife, of the city of Milwaukee, in the State of Wisconsin, party of the first part, and Isaac N. Swain, of Berrian county, in the State of Michigan, party of the second part: whereas, the said party of the first part, with James F. Aldrich, is justly indebted to the said party of the second part, in the sum of forty-two thousand four hundred dollars, and interest from the 28th day of September, 1854, agreed and secured to be paid by a certain bond and mortgage, executed by the said parties of the first part, and said James F. Aldrich and his wife, to the said party of the second part, bearing even date herewith, to secure a part of the purchase money for the premises described in said mortgage.

Now, therefore, this indenture witnesseth, that the said party of the first part for the securing of the payment of the money aforesaid, with the interest thereon, according to the tenor and effect of the said bond and mortgage above mentioned: and also in consideration of the further sum of one dollar, to them in hand paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, all of the undivided one-third part of all these certain pieces, parcels, or lots of land, lying and being in the city of Milwaukee aforesaid, and known and described as being lots numbered seven, eight, nine, and ten, in block number thirty-two, in the second ward of said city of Milwaukee aforesaid, and which lots is situated and being the flouring mill known as the "Empire Mill," owned and occupied by the said John W. Medbery and Martin B. Medbery;, and, the said parties of the first part hereby covenant to

and with the said party of the second part, that said premises above described, are free and clear of all incumbrances previous to this indenture; to have and to hold the same, together with all and singular, the tenements, hereditaments, and privileges, and appurtenances thereunto belonging, or in anywise appertaining; and also, all the estate, interest, and claim whatsoever, in law as well as in equity,
which the party of the first part have in and to the premises
22 hereby conveyed unto said party of the second part, his heirs,
assigns, and to their only proper use, benefit, and behoof: Provided always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon at the time, and in the manner specified in the above-mentioned bond and mortgage, executed by the said parties of the first part, and said James F. Aldrich and his wife, to the said party of the second part, bearing even date herewith, &c., as aforesaid, according to the true intent and meaning thereof, then, and in that case, these presents and every thing herein expressed shall be absolutely null and void.

In witness whereof, the said party of the first part hereunto have set their hands and seals, the day and year first above written.

(Signed) JOHN W. MEDBERY. [SEAL.]
MARY R. MEDBERY. [SEAL.]

Sealed & delivered in the presence of—
WM. WALLACE STEWART.
A. LANDON, JR.

It is hereby stipulated and agreed by the said party of the second part within named, that if within two years from this date, the large saw mill, fifty by one hundred and fifty feet in size, shall be properly built and completed upon the foundation commenced last fall, by driving piles, which is on the premiess described in said mortgage, mentioned as being executed by the said John W. Medbery & James F. Aldrich and their wives, to accept in place of the within mortgage, security in proper fire insurance policy or policies on said large saw mill, and thereupon to discharge the within mortgage, to which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself, his heirs, executors, administrators, and assigns.

Dated April 14th, 1855.

(Signed) ISAAC N. SWAIN. [SEAL.]

In presence of—
WILLIAM WALLACE STEWART.
A. LANDON, Jr.

23 And your orators further show unto your honors, that the mortgage and agreement were executed cotemporaneously, and upon the same sheet of paper, and were each duly witnessed,

acknowledged, and certified so as to entitle the same to be recorded, and the same were recorded together in the office of the register of deeds of the county of Milwaukee, within the district aforesaid, on the 21st day of April, 1855, in vol. 30 of mortgages, on page 12, &c., as by reference to the said mortgage and agreement will more fully & at large appear.

And your orators further show unto your honors, that subsequent to the execution of the mortgage and agreement aforesaid, the said John W. Medbery and his wife, by deed of warranty, sold and conveyed their interest in and to the lots and mill aforesaid, and that your orators subsequently became the purchasers, and they were, at the time of the commencement of this suit in the State court aforesaid, the owners in fee of the said lots and mill aforesaid; the said S. H. Seamans of an undivided one-half part thereof, and the said Catharine M. Stevens, in her own right, of an undivded one-fourth part thereof, & upon the representations of the said John W. Medbery that the mortgage and agreement aforesaid were fully satisfied and performed, and that he could & would procure a satisfaction thereof.

And your orators further show unto your honors, that said John W. Medbery is wholly insolvent and irresponsible, and wholly unable to respond to any judgment or damages that may be recovered against him, under and in pursuance of his covenant of warranty contained in his deed aforesaid.

And your orators further shows unto your honors, that subsequent to the execution of the agreement attached to the mortgage aforesaid, and within the time mentioned in said agreement, there was built and completed upon the lands described in the mortgage from said Medbery and Aldrich to the defendant, and upon the foundation referred to in said written agreement, a large saw mill, of seventy-eight by one hundred feet in size, being larger, of ~~quarter~~ value, and better adapted for the purposes intended than one of the dimension mentioned
24 in said written agreement, and that the said mill as built and completed was assented to, and accepted by the said defendant as a compliance with the said written agreement.

And your orators further show unto your honors, that the said Medbery & Aldrich, on or about the 30th day of May, 1856, did cause said large saw mill to be insured for the period of one year in the Ætna Insurance Company of Hartford, Connecticut. policy No. 371, for the sum of two thousand dollars, and in the Washington Insurance Company, of Cleveland, Ohio, for the further sum of two thousand dollars, and in the Jackson Insurance Company, of Jackson, Michigan, for the further sum of two thousand dollars, and each and all in proper fire insurance policies; and that such insurance policies were duly assigned or transferred and delivered to the said defendant, and were accepted or assented to by the said defendant as a compliance with the said written agreement, and that the said defendant now has said policies of insurance in his possession or under his control.

And your orators further show unto your honors, that on or about the 12th day of October, 1857, the said defendant did cause the said

large saw mill to be further insured for the period of one year in the name of the said Medbery & Aldrich, for the use, benefit, and security of the said defendant, in the Ætna Insurance Company aforesaid, being policy No. 441, for the sum of fifteen hundred dollars, and in the Washington Union Company aforesaid, for the further sum of three thousand dollars, and in the Phœnix Insurance Company, of Hartford, Connecticut, for the further sum of fifteen hundred dollars, and at or about the same time, and in the same insurance companies, and covered by the same policies of insurance, the said defendant did insure the grist mill, then situate, and being upon the lands and premises aforesaid, to wit: for the sum of one thousand dollars in the Ætna Insurance Company, and in the further sum of one thousand dollars in the Washington Union Insurance Company, and that shortly thereafter the said grist mill was destroyed by fire, and the said defendant collected and received the whole or a greater part of said insurance moneys secured by said policies upon said grist mill, from said insurance conpanys, and at least the sum of one thousand dollars, and that said policies of insurance are now in the possession or under the control of the said defendant.

And your orators further show unto your honors, that on or about the 27th day of September, 1858, the said defendant did again cause the said large saw mill and other buildings situate upon the premises referred to in the written agreement aforesaid, to be insured for the period of one year, in the Market, Irving. Resolute, & other insurance companies of the city of New York, in the name of the said Medbery & Aldrich, for the use, benefit, and security of the said defendant, and that the said defendant did pay for insurance premiums thereon, the sum of two hundred and ten dollars; and that said policies of insurance are now the possession or under the control of the said defendant.

And your orators further show unto your honors, that the insurance obtained as aforesaid, by the said defendant, upon the said large saw mill and other buildings situate upon the premises referred to in the written agreement aforesaid, during the years 1857 & 1858 as aforesaid, was so obtained at the request of the said defendant, and with the consent of the said Medbery & Aldrich, or their assigns, and upon the understanding and agreement that the said Medbery & Aldrich, or their assigns should reimburse and pay the said defendant the amount of such insurance premium so paid by the said defendant.

And your orators further show unto your honors, that on or about the 27th day of November, 1858, upon an accounting had by and between the said defendant and the said Midbery & Aldrich, or their assigns, of the amount due and unpaid upon the mortgage aforesaid, executed by the said Medbery & Aldrich to the said defendant, there was paid to the said defendant by the said Medbery & Aldrich, or their assigns, the sum of fifteen thousand two hundred & thirty-six dollars and six cents, and in which amount was included the amount paid by the said defendant for insurance premiums as hereinbefore alleged, upon said large saw mill & other buildings situate upon the premises referred to in the within agreement aforesaid, during the years 1857 & 1858, the

acknowledged, and certified so as to entitle the same to be recorded, and the same were recorded together in the office of the register of deeds of the county of Milwaukee, within the district aforesaid, on the 21st day of April, 1855, in vol. 30 of mortgages, on page 12, &c., as by reference to the said mortgage and agreement will more fully & at large appear.

And your orators further show unto your honors, that subsequent to the execution of the mortgage and agreement aforesaid, the said John W. Medbery and his wife, by deed of warranty, sold and conveyed their interest in and to the lots and mill aforesaid, and that your orators subsequently became the purchasers, and they were, at the time of the commencement of this suit in the State court aforesaid, the owners in fee of the said lots and mill aforesaid; the said S. H. Seamans of an undivided one-half part thereof, and the said Catharine M. Stevens, in her own right, of an undivded one-fourth part thereof, & upon the representations of the said John W. Medbery that the mortgage and agreement aforesaid were fully satisfied and performed, and that he could & would procure a satisfaction thereof.

And your orators further show unto your honors, that said John W. Medbery is wholly insolvent and irresponsible, and wholly unable to respond to any judgment or damages that may be recovered against him, under and in pursuance of his covenant of warranty contained in his deed aforesaid.

And your orators further shows unto your honors, that subsequent to the execution of the agreement attached to the mortgage aforesaid, and within the time mentioned in said agreement, there was built and completed upon the lands described in the mortgage from said Medbery and Aldrich to the defendant, and upon the foundation referred to in said written agreement, a large saw mill, of seventy-eight by one hundred feet in size, being larger, of quarter value, and better adapted for the purposes intended than one of the dimension mentioned
24 in said written agreement, and that the said mill as built and completed was assented to, and accepted by the said defendant as a compliance with the said written agreement.

And your orators further show unto your honors, that the said Medbery & Aldrich, on or about the 30th day of May, 1856, did cause said large saw mill to be insured for the period of one year in the Ætna Insurance Company of Hartford, Connecticut, policy No. 371, for the sum of two thousand dollars, and in the Washington Insurance Company, of Cleveland, Ohio, for the further sum of two thousand dollars, and in the Jackson Insurance Company, of Jackson, Michigan, for the further sum of two thousand dollars, and each and all in proper fire insurance policies; and that such insurance policies were duly assigned or transferred and delivered to the said defendant, and were accepted or assented to by the said defendant as a compliance with the said written agreement, and that the said defendant now has said policies of insurance in his possession or under his control.

And your orators further show unto your honors, that on or about the 12th day of October, 1857, the said defendant did cause the said

large saw mill to be further insured for the period of one year in the name of the said Medbery & Aldrich, for the use, benefit, and security of the said defendant, in the Ætna Insurance Company aforesaid, being policy No. 441, for the sum of fifteen hundred dollars, and in the Washington Union Company aforesaid, for the further sum of three thousand dollars, and in the Phœnix Insurance Company, of Hartford, Connecticut, for the further sum of fifteen hundred dollars, and at or about the same time, and in the same insurance companies, and covered by the same policies of insurance, the said defendant did insure the grist mill, then situate, and being upon the lands and premises aforesaid, to wit: for the sum of one thousand dollars in the Ætna Insurance Company, and in the further sum of one thousand dollars in the Washington Union Insurance Company, and that shortly thereafter the said grist mill was destroyed by fire, and the said defendant collected and received the whole or a greater part of said insurance moneys secured by said policies upon said grist mill, from said insur-
25 ance conpanys, and at least the sum of one thousand dollars, and that said policies of insurance are now in the possession or under the control of the said defendant.

And your orators further show unto your honors, that on or about the 27th day of September, 1858, the said defendant did again cause the said large saw mill and other buildings situate upon the premises referred to in the written agreement aforesaid, to be insured for the period of one year, in the Market, Irving. Resolute, & other insurance companies of the city of New York, in the name of the said Medbery & Aldrich, for the use, benefit, and security of the said defendant, and that the said defendant did pay for insurance premiums thereon, the sum of two hundred and ten dollars; and that said policies of insurance are now the possession or under the control of the said defendant.

And your orators further show unto your honors, that the insurance obtained as aforesaid, by the said defendant, upon the said large saw mill and other buildings situate upon the premises referred to in the written agreement aforesaid, during the years 1857 & 1858 as aforesaid, was so obtained at the request of the said defendant, and with the consent of the said Medbery & Aldrich, or their assigns, and upon the understanding and agreement that the said Medbery & Aldrich, or their assigns should reimburse and pay the said defendant the amount of such insurance premium so paid by the said defendant.

And your orators further show unto your honors, that on or about the 27th day of November, 1858, upon an accounting had by and between the said defendant and the said Midbery & Aldrich, or their assigns, of the amount due and unpaid upon the mortgage aforesaid, executed by the said Medbery & Aldrich to the said defendant, there was paid to the said defendant by the said Medbery & Aldrich, or their assigns, the sum of fifteen thousand two hundred & thirty-six dollars and six cents, and in which amount was included the amount paid by the said defendant for insurance premiums as hereinbefore alleged, upon said large saw mill & other buildings situate upon the premises referred to in the within agreement aforesaid, during the years 1857 & 1858, the

26 the sum of four hundred and forty-six dollars and fifty cents, and for interest thereon at the rate of ten per cent. per annum from the time of such payments of insurance premiums, the sum of twenty-three dollars and fifty-five cents.

And your orators further show unto your honors, that after the destruction by fire of the grist mill, as hereinbefore alleged, the said Medbery & Aldrich, or their assigns did build and erect a new grist mill, at their own cost & expense, upon the lands & premises referred to in said written agreement, of the value of five thousand dollars & upwards, and of greater value than the one destroyed by fire, and which said mill was at the time of the sale, hereinafter mentioned, and is now standing, and remaining upon said premises.

And your orators further show unto your honors, that during the building and erection of the said large saw mill upon the premises referred to in the written agreement aforesaid, by the said Medbery and Aldrich, the said defendant was present at different times, and was informed by the said John W. Medbery & James F. Aldrich, or one of them, of the intended, or the then variation in the dimensions of said saw mill, from fifty by one hundred & fifty feet, as specified in said written agreement, and that the said mill as was then being built, and as was completed, would be of greater value, and better adapted for the uses & purposes intended than it would be if built of the said dimensions as specified in said written agreement, and that the said defendant was then and there asked by the said Medbery and Aldrich, or one of them, to consent to such alteration, and accept of the mill as then being built, and since completed, in lieu of the one mentioned in said written agreement, and that the said defendant did then and there agree to accept, and did accept the said mill so being built & afterwards completed, in lieu of the one mentioned in said written agreement, and as a compliance on the part of the said John W. Medbery or of Medbery & Aldrich, with the said written agreement on his or their part.

And your orators further show unto your honors, that the said John W. Medbery, and the said Medbery & Aldrich, or their assigns.

27 fully kept & performed all the conditions on his & their part to be kept & performed & specified in the written agreement attached to the mortgage aforesaid.

And your orators further show unto your honors, that the said defendant has received, and there has been paid to the said defendant in cash upon the mortgage executed by the said Medbery & Aldrich to the said defendant, since the execution and delivery thereof, the sum of about twenty thousand dollars, and that the said Medbery & Aldrich expended upon the lands and premises described in the said mortgage in improvements upwards of forty thousand dollars, paying for the building of the large saw mill, specified in the agreement aforesaid, upwards of twenty-five thousand dollars; that the said defendant, by reason of the non-payment of certain instalments due and payable as specified in said mortgage executed by said Medbery & Aldrich, caused said mortgage to be foreclosed in the circuit court of Berrien county, State of Michigan, and obtained a decree for the

sale of said lands and premises, and under which said decree there was claimed to be due on the 15th day of April, 1863, including interest, costs, and expenses, the sum of twenty-two thousand four hundred and sixty-four dollars and eleven cents; and that on that day the said land and premises were sold under and in pursuance of said decree, and the said defendant, together with Galen M. Fisher and Burrill A. Olney, became the joint purchasers of the whole of said lands and premises described in the said mortgage from Medbery & Aldrich to the said defendant, together with all the improvements situate and being thereon, and made & erected by the said Medbery & Aldrich, or their assigns, including the said large saw mill, at the sum of nineteen thousand six hundred dollars; that the said lands and premises, with the improvements thereon, were actually worth at the time of said sale at least the sum of fifty-thousand dollars.

And your orators further show unto your honors, that prior to the said purchase of the said lands and premises by the said Fisher, Olney, & the said defendant, the said defendant had contracted with the said Fisher & Olney, that they, the said Olney & Fisher, & the
28 said defendant should become the purchasers at the sale aforesaid for a small amount, and less than the amount due upon the decree aforesaid, and that in fact the said Fisher & Olney agreed to pay & have paid, or secured to be paid to the said defendant, for their share and interest in said purchase an amount of money, or its equivalent, which, with the interest of the said defendant therein, would equal, or exceed the amount due and remaining unpaid on the decree aforesaid on the day of said sale.

And your orators further show unto your honors, that prior to the commencement of this action in the State court as aforesaid, and the filing of this bill, your orator caused to be, and there was, made, on behalf of your orators, or of some one or more of your orators, on the 18th & 27th days of February, 1863, at Detroit, in the State of Michigan, a demand, in writing, upon the said defendant to execute & deliver to your orators, a satisfaction of the mortgage executed by the said John W. Medbery and wife, and hereinbefore fully set forth, and at the same time and place there was offered and tendered to the said defendant the sum of three dollars, in lawful money of the United States, to pay the necessary expenses, and which amount was sufficient therefor, for the due and proper execution and acknowledgement of said satisfaction of mortgage, and at the same time and place there was also exhibited and tendered to the said defendant a written form of satisfaction of said mortgage, and that the said defendant did then and there absolutely refuse to execute or acknowledge satisfaction of said mortgage, to the great injury and damage of your orators.

To the end therefore, that the said Isaac N. Swain may without oath, his answer on oath being hereby waived, full, true, direct, and perfect answer make to all and singular the matters aforesaid, as fully and particularly, paragraph by paragraph, as if the same were here again repeated and he thereto particularly interrogated, and more especially that he may answer and set forth according to the best of his knowledge, remembrance, information, and belief.

First. Whether or not the said complainants were the owners in fee of the lots of land, with the "mill" thereon, as hereinbefore alleged in this bill.

29 Second. Whether or not the said defendant sold & conveyed to the said Medbery & Aldrich the lands situate in the State of Michigan, and upon the terms and conditions as hereinbefore alleged in this bill.

Third. Whether or not the said John W. Medbery was the owner of an undivided one-third part of said lots and mills, and executed and delivered to the said defendant the mortgage, and the said defendant executed and delivered to the said John W. Medbery, the agreement as hereinbefore alleged, stated and set forth in this bill; and whether or not the said mortgage and agreement were executed cotemporaneously, and upon the same sheet of paper, and recorded as hereinbefore stated in this bill.

Fourth. Whether or not the said John W. Medbery and his wife sold and conveyed their interest in and to said lots and mill, and the said complainants subsequently became, and were at the time alleged, the owners in fee of the whole of said lots and mill, and in the protions as hereinbefore stated in this bill.

Fifth. Whether or not the said John W. Medbery is wholly insolvent as hereinbefore stated in this bill.

Sixth. Whether or not there was built and completed upon the foundation referred to in said written agreement, executed by the said defendant, and hereinbefore set forth, a large saw mill, within the time as specified in said agreement, and of the dimensions, and of the value as hereinbefore stated in this bill. And whether or not the said mill as completed was assented to, or accepted by the said defendant as a compliance with said written agreement. What was ~~thy~~ dimensions of said mill as built, including the part not under cover? How much of said mill is, and is not, under cover? What are the dimensions of the platform on the down stream side of said mill? When was said mill, as built, completed? Whether or not said mill, as built, was & is of greater value, and better adapted for the purposes & business intended than a mill built of the dimensions of fifty by one hundred and fifty.

Seventh. Whether or not the said Medbery & Aldrich, on or
30 about the 30th day of May, 1856, insured or caused to be insured the said saw mill, for the time, in the insurance companies, and for the amounts as hereinbefore stated in this bill. And whether or not said policies of insurance were assigned or transferred and delivered to the said defendant; and whether or not the same were accepted or assented to by the said defendant, and whether or not said policies are in the possession or under the control of the said defendant, as hereinbefore stated in this bill. Attach copies of such policies to your answer, and if not in your posession, state what have become of such policies of insurance.

Eighth. Whether or not the said defendant, on or about the 12th day of October, 1857, insured or caused to be insured, in the name of Medberry & Aldrich, for the benefit of the said defendant, the said

saw mill and other property, for the time, in the insurance companies and for the amounts as hereinbefore stated in this bill. And whether or not the said grist mill was destroyed by fire during the existence of such policies of insurance, and the amounts of insurance upon said grist mill paid to the said defendant, as hereinbefore stated in this bill. Whether or not such policies of insurance are now in the possession or under the control of the said defendant, and if so, attach thereof to your answer, and if not, state what have become of such policies of insurance.

Ninth. Whether or not the said defendant, on or about the 27th day of September, 1858, insured or caused to be insured the said large saw mill, for the time, at the place, and in the insurance companies as hereinbefore stated in the bill. Whether or not the said defendant paid the amount of insurance premiums as stated in this bill. State the name of each company in which such insurance was obtained and what amount of insurance was obtained in each company on said large saw mill, and the insurance premiums paid therefor. Whether or not such insurance policies aslast aforesaid are in the possession or under the control of the said defendant, and if so, attach copies thereof to your answer, and if not, state what have become of such policies of insurance.

Tenth. Whether or not the insurance so obtained by the
31 said defendant, in the years 1857 and 1858, was at the request of the said defendant, and with the assent of said Medbery & Aldrich, or their assigns, and upon the understanding as hereinbefore alleged in this bill.

Eleventh. Whether or not, on or about the 27th day of November, 1858, the accounting was had between the said Medbery & Aldrich, or their assigns, and the said defendant, the amount of money paid, and included therein, the amount of insurance premiums paid, during the years 1857 and 1858, with interest thereon, as hereinbefore stated in this bill.

Twelfth. Whether or not there was erected a new grist mill, by the said Medbery & Aldrich, or their assigns, at the time, and of the value as hereinbefore stated in this bill, and whether or not the said new grist mill, is remaining upon said ~~premiums~~ premises.

Thirteenth. Whether or not the said defendant was present during the building and erection of said large saw mill, and notified of the change in the dimensions of said mill, and requested to accept of the same, and did accept of the same as hereinbefore stated in this bill.

Fourteenth. Whether or not there has been paid to and received by the defendant, upon the mortgage executed by the said Medbery & Aldrich the amount of money as hereinbefore stated in this bill, and what amount. Whether or not the amount was expended in improvements, and in the building of said large saw mill as hereinbefore stated in this bill. Whether or not the amount was claimed to be due under the decree of foreclosure of the mortgage of Medbery & Aldrich, on the 15th day of April, 1863, and whether or not on that day the premises and property described in said mortgage and decree, with all the improvements thereon were sold to the said de-

First. Whether or not the said complainants were the owners in fee of the lots of land, with the "mill" thereon, as hereinbefore alleged in this bill.

29 Second. Whether or not the said defendant sold & conveyed to the said Medbery & Aldrich the lands situate in the State of Michigan, and upon the terms and conditions as hereinbefore alleged in this bill.

Third. Whether or not the said John W. Medbery was the owner of an undivided one-third part of said lots and mills, and executed and delivered to the said defendant the mortgage, and the said defendant executed and delivered to the said John W. Medbery, the agreement as hereinbefore alleged, stated and set forth in this bill; and whether or not the said mortgage and agreement were executed cotemporaneously, and upon the same sheet of paper, and recorded as hereinbefore stated in this bill.

Fourth. Whether or not the said John W. Medbery and his wife sold and conveyed their interest in and to said lots and mill, and the said complainants subsequently became, and were at the time alleged, the owners in fee of the whole of said lots and mill, and in the protions as hereinbefore stated in this bill.

Fifth. Whether or not the said John W. Medbery is wholly insolvent as hereinbefore stated in this bill.

Sixth. Whether or not there was built and completed upon the foundation referred to in said written agreement, executed by the said defendant, and hereinbefore set forth, a large saw mill, within the time as specified in said agreement, and of the dimensions, and of the value as hereinbefore stated in this bill. And whether or not the said mill as completed was assented to, or accepted by the said defendant as a compliance with said written agreement. What was ~~thy~~ dimensions of said mill as built, including the part not under cover? How much of said mill is, and is not, under cover? What are the dimensions of the platform on the down stream side of said mill? When was said mill, as built, completed? Whether or not said mill, as built, was & is of greater value, and better adapted for the purposes & business intended than a mill built of the dimensions of fifty by one hundred and fifty.

Seventh. Whether or not the said Medbery & Aldrich, on or
30 about the 30th day of May, 1856, insured or caused to be insured the said saw mill, for the time, in the insurance companies, and for the amounts as hereinbefore stated in this bill. And whether or not said policies of insurance were assigned or transferred and delivered to the said defendant; and whether or not the same were accepted or assented to by the said defendant, and whether or not said policies are in the possession or under the control of the said defendant, as hereinbefore stated in this bill. Attach copies of such policies to your answer, and if not in your posession, state what have become of such policies of insurance.

Eighth. Whether or not the said defendant, on or about the 12th day of October, 1857, insured or caused to be insured, in the name of Medberry & Aldrich, for the benefit of the said defendant, the said

saw mill and other property, for the time, in the insurance companies and for the amounts as hereinbefore stated in this bill. And whether or not the said grist mill was destroyed by fire during the existence of such policies of insurance, and the amounts of insurance upon said grist mill paid to the said defendant, as hereinbefore stated in this bill. Whether or not such policies of insurance are now in the possession or under the control of the said defendant, and if so, attach thereof to your answer, and if not, state what have become of such policies of insurance.

Ninth. Whether or not the said defendant, on or about the 27th day of September, 1858, insured or caused to be insured the said large saw mill, for the time, at the place, and in the insurance companies as hereinbefore stated in the bill. Whether or not the said defendant paid the amount of insurance premiums as stated in this bill. State the name of each company in which such insurance was obtained and what amount of insurance was obtained in each company on said large saw mill, and the insurance premiums paid therefor. Whether or not such insurance policies aslast aforesaid are in the possession or under the control of the said defendant, and if so, attach copies thereof to your answer, and if not, state what have become of such policies of insurance.

Tenth. Whether or not the insurance so obtained by the
31 said defendant, in the years 1857 and 1858, was at the request of the said defendant, and with the assent of said Medbery & Aldrich, or their assigns, and upon the understanding as hereinbefore alleged in this bill.

Eleventh. Whether or not, on or about the 27th day of November, 1858, the accounting was had between the said Medbery & Aldrich, or their assigns, and the said defendant, the amount of money paid, and included therein, the amount of insurance premiums paid, during the years 1857 and 1858, with interest thereon, as hereinbefore stated in this bill.

Twelfth. Whether or not there was erected a new grist mill, by the said Medbery & Aldrich, or their assigns, at the time, and of the value as hereinbefore stated in this bill, and whether or not the said new grist mill, is remaining upon said ~~premiums~~.

Thirteenth. Whether or not the said defendant was present during the building and erection of said large saw mill, and notified of the change in the dimensions of said mill, and requested to accept of the same, and did accept of the same as hereinbefore stated in this bill.

Fourteenth. Whether or not there has been paid to and received by the defendant, upon the mortgage executed by the said Medbery & Aldrich the amount of money as hereinbefore stated in this bill, and what amount. Whether or not the amount was expended in improvements, and in the building of said large saw mill as hereinbefore stated in this bill. Whether or not the amount was claimed to be due under the decree of foreclosure of the mortgage of Medbery & Aldrich, on the 15th day of April, 1863, and whether or not on that day the premises and property described in said mortgage and decree, with all the improvements thereon were sold to the said de-

fendant, and Fisher and Olney, and for the amount as hereinbefore stated in this bill, and whether or not the actual value of said property and improvements at the time of said sale, did not exceed the amount as hereinbefore stated in this bill. What improvements in mills, buildings, or otherwise, were made, erected, and placed upon the premises described in the mortgage from Medbery & Aldrich, and in the decree aforesaid, by the said Medbery & Aldrich, or their assigns, subsequent to the execution of such mortgage, and prior to the sale aforesaid, and what was the cost thereof. Were such improvements still remaining upon said premises at the time of said sale?

Fifteenth. Whether or not the said defendant, and the said Fisher & Olney entered into an agreement, or had an understanding, prior to the sale aforesaid, in substance or to the effect as hereinbefore stated in this bill. What agreement or understanding existed between said Fisher & Olney, and the said defendant prior to said sale, in regard to the purchase of said premises and property, and the bidding at said sale? What is the interest of the said Fisher and of the said Olney in and to the property so purchased at said sale, and what price did they, and each of them, pay or agree to pay therefor, and to whom, and what were the terms of payment, and how secured, and what is the interest of the said defendant in connection with the said Fisher & Olney, or otherwise in and to the said premises and property purchased at said sale?

Sixteenth. Whether or not there was a demand in writing made upon the said defendant on the 18th and 27th days of February, 1863, to satisfy the mortgage executed by the said John W. Medbery to the said defendant, and the tender made of the money, and of the written satisfaction ~~price~~, and the defendant refused to execute such satisfaction as hereinbefore stated in this bill. Whether or not the said defendant has the written notice or demand served upon him in his possession, and if so, attach a copy thereof to his answer.

And that the said mortgage made and executed by the said John W. Medbery and Mary R. Medbery, his wife, to the said defendant, Isaac N. Swain, bearing date the 14th day of April, 1855, and recorded in the office of the register of deeds of the county of Milwaukee, State of Wisconsin, in the district aforesaid, in vol. 30 of mortgages in pages 12, &c., may be ordered and adjudged to be cancelled and discharged of record. And that your orators may have such other and further relief as the nature of their case shall require, and as shall be agreeable to equity and good conscience.

May it please your honor to grant unto your orators a writ of subpœna issued out of, and under the seal of this honorable court, to be directed to the said Isaac N. Swain, commanding him at a certain day, and under a certain penalty therein to be inserted, personally to be, and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, abide by, and

perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience.

And your orators will ever pray, &c.

N. C. GRIDLEY,
Compl't's Sol's.
MATT. H. CARPENTER,
Of Counsel.

And same day on motion of N. C. Gridley, solicitor for complainant, it is ordered that the defendant plead, answer, or demur to the complainants' bill of complaint on file by the first Monday of October, A. D. 1863, or an order will be entered taking said bill as confessed.

OCOTBER, 20, 1863.

This day came the defendant, by his solicitors, Messrs. Finches, Lynde & Miller, and filed his answer, in the words and figures following, to wit:

34 Circuit court of the United States for the district of Wisconsin.

The answer of Isaac N. Swain, defendant, to the bill of complaint of Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling, complainants.

This defendant now, and at all times hereafter, reserving to himself all benefit of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or to so much and such parts of said bill as he is advised are material for him to make answer unto, he answering, says:

He knows not, save by said bill, whether, at the time alleged or since, the complainants were the owners of said lots nine, ten, and part of lot eight in block twenty-two, in the city of Milwaukee, described in said bill, and leaves the complainants to make such proof of the averment as they shall be advised.

He admits and avers that he sold and conveyed to John W. Medbery and James F. Aldrich a large quantity of real estate situate in Berrien county, Michigan, on the fourteenth of April, eighteen hundred and fifty-five, for the sum of fifty-two thousand four hundred dollars, of which ten thousand dollars were paid him in cash, and the balance whereof was secured to be paid him by a mortgage of the same date, collateral to a bond of the same date, payable in installments as follows, viz: Six thousand two hundred dollars on the twenty-eighth of September, eighteen hundred and fifty-five; six thousand two hundred dollars on the twenty-eighth of September, eighteen hundred and fifty-six, and five thousand dollars on the twenty-eighth of September, eighteen hundred and fifty-seven, and the same sum on that day in each year down to, and including the year eighteen hundred and sixty-two, and interest annually, to be computed from the twenty-eighth day of September, eighteen hundred and fifty-four, at the rate of seven per cent. per annum on all sums before due, and at ten per cent. per annum on all sums after due, until paid,

which said mortgage and bond are now in this defendant's possession and ready to be produced as this honorable court shall direct,
35 and which mortgage was duly recorded in the office of the register of deeds of the county of Berrien in Michigan, on the nineteenth day of April, eighteen hundred and fifty-five, as allowed and required by the laws of that State.

This defendant also admits that said John W. Medbery was, as set forth in said bill, the owner of an undivided third part of the said lots and the mill thereon, in Milwaukee, and that on the fourteenth of April, eighteen hundred and fifty-five, the said John W. Medbery and Mary R., his wife, executed and delivered to this defendant a mortgage thereon, and that this defendant executed the agreement, endorsed on said mortgage, as set forth and averred in said bill; which last mentioned mortgage was duly recorded in the office of the register of deeds for Milwaukee county, on the twenty-first day of April, eighteen hundred and fifty-five, and is now in this defendant's possession, to which this defendant refers himself for greater certainty.

This defendant knows not, and therefore can neither admit or deny that said Medbery is insolvent, as alleged in the bill.

This defendant denies that the said saw mill, alleged in said bill, as having been built upon the foundation referred to in said written agreement, seventy-eight feet by one hundred feet, was either built of any such size, or upon the foundation therein referred to, or of greater value or better adapted to the purposes intended; and he denies that it was built or completed with his assent or consent, and he denies that it was accepted by him as a compliance with said written agreement; on the contrary he avers that it was not built of the size stipulated, nor upon the foundation required by said agreement, and that in consequence of its not being built upon that foundation, but on a different one, this defendant was greatly injured and damaged to a large amount by said Medbery and Aldrich, a fact well-known to them, and each of them, and which he believes was well-known to the complainants, and each of them when they became interested in the real estate in controversy in the present case.

This defendant further says that he has no recollection, and therefore denies that said Medbery and Aldrich, or either of them, caused the pretended policies of insurance claimed in said bill to have
36 been effected in the Ætna, Washington, and the Jackson Insurance Companies, to be assigned to him, this defendant, or in any way to be delivered or transferred to him, or that he ever accepted them, or any of them, or in any way assented to them, or any of them, as a compliance with said written agreement, and he denies, upon the best of his recollection and belief, that he ever has had them, or any of them, in his possession or under his control.

And as to so much of said bill as alleges, that on or about the twelfth of October, eighteen hundred and fifty-seven, this defendant caused the said large saw mill to be insured, in the name of said Medbury and Aldrich, for one year, &c., this defendant, further answering, denies the truth of this allegation.

And as to the averment that this defendant, at or about the same

time insured the grist mill on the lands and premises mentioned in said mortgage from said Medbury and Aldrich, this defendant, answering, says he did cause said grist mill, but not the said large saw mill, to be insured, for the sum of one thousand dollars, for one year, in the name of said Medbury and Aldrich, but for the benefit of this defendant as mortgagee, as he was authorized to do by the terms of said last-mentioned mortgage, the said Medbury and Aldrich not having insured it as required by the terms of said mortgage.

He further admits that said grist mill was burnt during the life of said insurance, and that he collected the insurance money to the amount of one thousand dollars, and no more, and applied it as required by said mortgage. As to the averment that, about the twenty-seventh of September, eighteen hundred and fifty-eight, this defendant caused the said large saw mill and other buildings situate on the premises to be insured, &c., this defendant admits that he did so, owing to the neglect of said Medbury and Aldrich to comply, in this behalf, with their said mortgage, and in the exercise of this defendant's right under the same.

He further says that the insurance which he, this defendant, effected, as aforesaid, was not effected, as alleged, with the consent of said Medbury and Aldrich, or their assigns, but only on the motion of this defendant, and without their knowledge or consent, the defendant acting in the premises solely under the said mortgage.

37 As to the allegation that, on or about the twenty-seventh of November, eighteen hundred and fifty-eight, the said Medbury and Aldrich paid this defendant the sum of fifteen thousand two hundred and thirty-six dollars and six cents, in which amount was included the amount paid by said defendant for insurance ~~premises~~, &c., this defendant says he admits he had an accounting with the assigns of said Medbury and Aldrich on that day. He does not remember the items of the account, but he is sure that on that occasion he applied only the sum of fourteen thousand six hundred dollars and forty-three cents on said mortgage, and he leaves the complainants to make such proof of this allegation as they shall be advised.

As to the averment that, during the building of the said large saw mill, this defendant was present from time to time, and was then and there asked to consent to the deviation from the terms of said agreement, and that he then and there agreed to accept the mill in lieu of the one mentioned in said agreement, &c., this defendant says the whole of said averment is untrue; that during the erection of said mill he was out of the State, and without any knowledge of the deviation; but that the moment he learned of the deviation he objected and protested against it, and never consented to it at all as a compliance with the terms of said agreement.

This defendant admits that he, by regular, formal, legal proceeding in the circuit court of Berrien county, Michigan, foreclosed said mortgage against said Medbury and Aldrich, and their wives, and obtained a regular decree of sale of the mortgaged premises, which,

after due notice, as required by the rules and practice of the court, took place on the fifteenth day of April, eighteen hundred and sixty-three, and at which date this defendant, and Galen M. Fisher and Burrill A. Olney, the highest bidders, became the joint purchasers of the mortgaged premises, each purchasing an undivided third part thereof, to whom they were struck off at auction at the sum of nineteen thousand six hundred dollars, the highest sum offered therefor, although the said complainants, or some of them, were represented at said sale, which sale was in all respects fair, equitable, and
38 legal, and was duly confirmed by an order of the court, but which did not satisfy the decree of foreclosure, the balance remaining due thereon being the sum of two thousand eight hundred and sixty-four dollars and forty-seven cents, which, with interest at ten per cent. per annum, and also a large amount paid by this defendant for taxes assessed upon said property, still remain due to this defendant on the bond and mortgage given him by said Medbury and Aldrich, and on said decree of foreclosure, and is, as this defendant insists, secured by said mortgage from said John W. Medbury and his wife, to him on the lots in Milwaukee; this defendant, for greater certainty, referring to the record of such foreclosure proceedings.

As to the averment that this defendant, with said Fisher and Olney, that the three should become the purchasers of the premises at a small amount, and less than the amount due upon the decree, &c., this defendant says he made no such proposal, nor was any such agreement entered into; but that the three did agree, prior to the sale, to bid jointly, but not to bid above the amount of twenty thousand dollars; and that if any one should bid to the amount of twenty thousand dollars, they would not compete, but let the property be sold to such bidder; that the highest adverse bid was only to the amount of nineteen thousand five hundred dollars, which bid was made a Mr. Haight, formerly the owner of the same property mentioned in the bill as the Empire mill, in Milwaukee; nor have the said Fisher and Olney, or either of them, paid, or agreed to pay, to this defendant, as alleged in said bill, for said mortgaged property sold as aforesaid, an amount which, with the interest of said defendant in the said foreclosed mortgage, would equal the amount due thereon at the time of said sale. The said Fisher and Olney have each accounted to this defendant for one undivided third part of said premises in the sum of six thousand five hundred and thirty-three and one-third dollars, and no more.

This defendant admits that a demand was made upon him to execute and deliver a release or satisfaction of said mortgage on the Empire mill premises at the time and in the manner set forth
39 in said bill in this behalf, and that he refused, and still refuses, to release the same, or in any way declare it satisfied, for the reason that there still remains justly due to him the balance above mentioned on the said decree of foreclosure, and certain moneys paid by this defendant, as aforesaid, for taxes on said premises before said sale, for the payment whereof the premises last

mentioned, in Milwaukee, are justly held under the mortgage in controversy.

And this defendant, further answering, says that he has no recollection or knowledge of ever having in his possession the policies of insurance referred to in the 8th special interrogatory, and cannot, therefore, produce copies thereof.

He further says that he has not in his possession the policies of insurance mentioned in the 9th special interrogatory, and cannot, therefore, attach copies to this answer, nor can he at present state the name of the companies in which they were obtained.

To the 12th special interrogatory he says, a grist mill was erected by, he thinks, the grantees of said Medbury and Aldrich at the time mentioned, but he knows not of what value, and he believes it still remains there.

In further answer to the 14th special interrogatory he says, he admits that since the execution and delivery of said mortgage from Medbury and Aldrich, he has been paid thereon in cash the sum of about twenty thousand dollars, as alleged, and something more. He admits that said Medbury and Aldrich erected a saw mill about sixty by seventy-eight feet in size, but not in accordance with said written agreement, but at what cost defendant is not informed. He denies that they or their grantees ever expended on said mortgaged premises forty thousand dollars in improvements, as alleged, or near that sum; and he alleges that they and their grantees committed great waste upon the lands by removing the valuable timber, and doing other acts prohibited by law or by the terms of their mortgage; and that from want of their proper care the said premises were greatly damaged by fire and floods, by general dilapidation and decay, and by the removal of about everything that could be severed from the freehold; that, by their neglect in paying the taxes imposed thereon, some of said lands have been sold for taxes, and the time for redemption thereof expired, and that nearly all of said lands would have been thus sacrificed had not this defendant redeemed them after their sale for taxes; so that for the above reasons the lands and premises were far less valuable at the time of said foreclosure and sale than when conveyed by this defendant.

All which matters and things this defendant is ready to aver and prove, as this honorable court shall direct; and prays to be hence discharged, with his reasonable costs and charges.

ISAAC N. SWAIN.
FINCHES, LYNDE & MILLER,
Sol'rs for Def't.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac N. Swain, of the city of Detroit, in said county and State, being duly sworn, says that he is the defendant in the foregoing answer named; that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein

stated to be on his information and belief, and that as to those matters this deponent believes it to be true.

ISAAC N. SWAIN.

Sworn to and subscribed before me, this eighth day of October, A. D. 1863.

ADDISON MANDELL,
United States Commissioner Eastern Dist. of Michigan.

OCTOBER 28, 1863.

This day came the complainants, by their counsel, and filed their exceptions to the defendant's answer in the words and figures following, to wit:

Circuit court of the United States for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHARINE M. STEVENS, and Edward P. Whaling, complainants,
vs.
ISAAC N. SWAIN.

41 Exceptions taken by the said complainants to the insufficient answer of the said defendant to the said complainant's bill of complaint:

First. For that the said defendant hath not to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth, whether or not he has, under his control, the policies of insurance referred to in the complainants' said bill on the 6th page thereof, and in the 8th special interrogatory, as having been obtained by the said defendant, in the name of Medbury & Aldrich, on or about the 12th day of October, 1857; nor what has become of such policies of insurance.

Second. For that the said defendant hath not in any manner aforesaid answered and set forth whether or not he has under his control the policies of insurance referred to in complainants' said bill on the 7th page thereof, and in the 9th special interrogatory as having been obtained by the said defendant, in the name of Medbury & Aldrich, on or about the 27th day of September, 1858; nor what has become of such policies of insurance.

Third. For that the said defendant hath not in any manner aforesaid answered and set forth whether or not said saw mill as built, and as alleged on the 5th page of said bill, and in the 6th special interrogatory, was or is better adapted for the purposes intended than a mill of the dimensions of fifty by one hundred and fifty feet in size; and for that the said defendant hath not answered and set forth the dimensions of said saw mill as built, including those parts not under cover; nor the dimensions of that part of said mill under cover; nor the dimensions of that part of said mill not under cover; nor when said mill, as built, was completed.

Fourth. For that the said defendant hath not in any manner afore-

said answered and set forth the actual amount of money paid to the said defendant, by Medbury & Aldrich and their assigns, upon the mortgage executed by said Medbury & Aldrich to said defendant; nor what improvements in mills, buildings, or otherwise were made and entered upon the said lands described in the said mortgage, and subsequent to the execution thereof; nor the cost thereof; nor whether such improvements were remaining upon said premises at the time of the sale thereof to said Fisher, Olney, and said defendant; all of which is referred to on the 9th page, and in the 14th special interrogatory of said bill.

42 In all which particulars the said complainant except to the answer of said defendant, as evasive, imperfect, and insufficient, and humbly pray that the said defendant may be compelled to put in a full and sufficient answer thereto.

N. C. GRIDLEY,
Sol'r for Compl'ts.

NOVEMBER 10, 1863.

This day came the parties, by their counsel, and by consent it is ordered by the court that the hearing of the exceptions to the answer of the defendant be had before the district judge at chambers.

DECEMBER 7, 1863.

This day, on motion of N. C. Gridley, complainants' solicitor, ordered that the exceptions of the complainants to the answer of the defendant on file in this cause, be set down for hearing on the first Monday of January next.

FEBRUARY 1, 1864.

The exceptions to the answer of the defendant having been submitted to the district judge at chambers, it is ordered that the said exceptions be, and hereby are allowed, and that the defendant put in a full and complete answer on the first Monday of March next.

MAY 3, 1864.

This day came the defendant, by Messrs. Finches, Lynde & Miller, his solicitors, and filed his answer in the words and figures following, to wit:

Circuit court of the United States for the district of Wisconsin.

The answer of Isaac N. Swain, defendant, to the bill of complaint of Stephen H. Seamens, Catherine M. Stevens, and Edward P. Whaling, complainants.

This defendant, now and at all times hereafter, reserving to himself all benefit of exceptions to the many errors and insufficiencies in said bill contained, for answer thereto, or to so much and such parts of said bill as he is advised are material for him to make answer unto, he answering, says:

He knows not, except by said bill, whether at the time alleged, or since, the complainants were the owners of said lots nine, ten,

43 and part of lot eight, in block twenty-two, in the city of Milwaukee, described in said bill, and leave the complainants to make such proof of the averment as they shall be advised.

He admits and avers that on the twenty-eighth day of September, A. D. eighteen hundred and fifty-four, he entered into a written contract with said John W. Medbury and James F Aldrich, in and by which he agreed to sell to them a large quantity of real estate in the counties of Berrien and Van Buren, in the State of Michigan, which contract was signed by this defendant, and by said Medbury and Aldrich, upon which contract was endorsed an additional or explanatory agreement, signed by this defendant and said Medbury, and by said Aldrich by said Medbury, adding to and explaining more clearly the terms and meaning of said contract; which said additional agreement bears date the second day of October of that year; that the consideration agreed to be paid to said defendant by said Medbury and Aldrich for said real estate, and certain franchises, rights, and privileges connected therewith, was the sum of fifty-two thousand four hundred dollars, to be paid as follows, viz: the sum of ten thousand dollars upon the delivery of the contract, or within ninety days thereafter; the further sum of six thousand two hundred dollars, and interest on the whole sum unpaid, on the twenty-eighth day of September, eighteen hundred and fifty-five; and the further sum of six thousand two hundred dollars, and interest as aforesaid, on the twenty-eighth day of September, eighteen hundred and fifty-six; and the balance of the principal sum of thirty thousand dollars in six annual instalments thereafter, of five thousand dollars each, and interest annually at the rate of seven per cent. per annum on all sums paid when or before due, and at the rate of ten per cent. per annum upon all sums after they shall have become due and payable, until paid. That said Medbury and Aldrich were to pay all taxes upon said real estate from and after said twenty-eighth day of September, eighteen hundred and fifty-four; and they also covenanted and agreed, in and by said contract and agreement, that there should be no unreasonable stripping of timber or waste upon said premises, so as to impair the securities, and that they would keep an insurance upon the insura-

44 ble property upon said premises for at least one-third of their value, for the benefit and security of this defendant, to be paid over to the defendant in case of losses, as part payment on the purchase price of said premises.

It was also stipulated in said agreement by said parties, in the words and figures following, viz:

"III. It is agreed and understood by the parties to this agreement, that after the payment of the said ten thousand dollars ($10,000,) then, or within ninety days thereafter, said party of the first part" (meaning this defendant) "agrees to execute, or cause to be executed, to the parties of the second part," (meaning said Medbury & Aldrich,) "their heirs or assigns, a good and sufficient warranty deed for the said lands above described, and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging; upon and at the same time the said parties of the second part" (meaning said

Medbury & Aldrich) "shall execute to said party of the first part" (this defendant) "good and sufficient security upon other property for the amount of six thousand six hundred and sixty-two and $\frac{2}{3}$ dollars. ($6,666\frac{2}{3}$.) and also their bond, and a good and sufficient mortgage upon the lands above described, and not reserved from this saled," (meaning the lands agreed to be sold as aforesaid,) "with the rights, privileges, and appurtenances thereunto belonging."

And this defendant further avers, that said contract contained a further stipulation, in the words and figures following, viz:

"Also, it is understood as aforesaid and agreed, that the use and occupany of the house, out-houses, and fixtures and premises enclosed therewith, where said Swain" (this defendant) "now resides with his mother, brothers, and sisters, is excepted and reserved by said Swain for his benefit, for one year from date hereof, then to be fully complete and ended, and surrendered, with the premises above conveyed, and also the use and occupancy of the shop, building, and fixtures connected with the same where Russel Swain (a brother of this defendant) now occupies, together with the use of the water as now used, or in a similar way, so long as said Russel Swain chooses or desires, and shall occupy the same free of any rent, let, or unnecessary hindrance, otherwise than if in the way of other important improvements, may be removed sufficiently to be reasonably
45 out of the way, and where he can have the same use and privileges as before; and when said Russel Swain is done with it, or abandons it not to occupy any more, then this reserve is to terminate, and be *be* fully complete and ended."

For a more complete understanding of said agreement, reference is hereto made to said contract, and said additional agreement thereon endorsed, now in this defendant's possession, ready to be produced as this honorable court shall direct, a copy of which is hereto annexed, marked exhibit "A."

This defendant, further answering, avers and states that before and at the time of the execution of said contract for the sale of said real estate, as aforesaid, he had planned and contemplated building another saw mill upon the said premises, fifty feet wide and one hundred and fifty feet long, there being sufficient room therefor between said shop, reserved as aforesaid for the use of the brother of this defendant as aforesaid, and a large double saw mill then in operation, and to locate the same between said shop and said double saw mill; that said Medbury & Aldrich approved of his plans, and it became a part of the agreement and conditions of the sale of said premises to them, that they should build said contemplated saw mill, but in the hurry of preparing the papers relative to the contracts (Mr. Aldrich being anxious to reach his home that week, and on that account the writings were hurriedly prepared) that part of the agreement was omitted from the writings, as were also some other things, which this defendant called to the attention of Mr. Medbury after Mr. Aldrich had left, (as Mr. Medbury had remained there,) some of which he corrected in the written contract, reference to which will more fully appear; but said Medbury at that time objected to obligate himself

and said Aldrich in writing to build said large saw mill, giving as a reason for his refusal that it was unnecessary, as they were anxious to build said large saw mill immediately, and as desirous to build it as this defendant could be to have it done, and even authorized and requested this defendant to contract with one Martin Ruggles to drive the piles for the foundation of the same, to be of the same size as planned by this defendant, viz: fifty feet in width by one hundred and fifty feet in length; and thereupon, this defendant did con-
46 tract with said Ruggles, on behalf of said Medbury and Aldrich, to drive the piles for the foundation of said contemplated large saw mill, of the size and form, and to be placed upon the place and location planned and selected, as aforesaid, by this defendant; that said Ruggles commenced and continued driving said piles, in pursuance of said agreement with him, during that fall for said foundation, it being for the large saw mill referred to in the agreement endorsed upon the mortgage of said Medbury and wife to this defendant, set forth in said complainant's bill of complaint.

And this defendant, further answering, avers that the ~~located~~ selected by him for said large saw mill was conveniently situated, and large enough, and well adapted for the location of a saw mill of the size and capacity planned by him as aforesaid, and the erection of the same would have in nowise interfered with the shop of the brother of this defendant, hereinbefore referred to, which this defendant was desirous of protecting, and it was one of the conditions of said sale that said shop should be allowed to remain as then situated, and to use the necessary water power therefor.

And this defendant further avers, that during the ensuing winter of eighteen hundred and fifty-four and eighteen hundred and fifty-five, and until about the twelfth day of April of the latter year, he remained at Watervliet, the place where said mills were located and said contracts were made, principally for the purpose of receiving his money from said Medbury and Aldrich ~~in~~ said contracts, and for them to furnish the other securities, agreed upon between them, to complete the terms and conditions of said contracts; that during that winter said Medbury was much of the time at said Watervliet, and often complained about the reservation of said shop as aforesaid, and the amount of water required to run the machinery therein, and his said brother was much ~~amazed~~ and hindered in the quiet and peaceable occupation of said shop by the acts of the employees of said Medbury and Aldrich. And this defendant was informed, and verily believes, that during that winter said Medbury threatened to get rid of that shop in some way, as it took too much water to run it, &c.,
47 although he well knew that it was part of the said agreement of sale that said shop should remain there, as the brother of this defendant, a deaf mute, occupied it for the purpose of gaining a livelihood, that its removal or destruction would throw him out of employment, and for support and maintenance upon the charity of this defendant.

And this defendant, further answering, admits that on or about the thirtieth day of September, eighteen hundred and fifty-four, said

Medbury and Aldrich paid him the sum of six thousand seven hundred and thirteen dollars and thirty-three cents, which was duly endorsed ~~in~~ said contract, (said exhibit "A,") and that on or about the twenty-eighth day of December following they paid him the further sum of three thousand two hundred and six dollars and sixty-seven cents, and interest on the same from the twenty-eighth day of September, eighteen hundred and fifty-four, which payment completed the said first payment of ten thousand dollars.

And this defendant further says, that within the time specified in said contract, (exhibit "A,") to wit, on the twenty-seventh day of March, A. D. eighteen hundred and fifty-five, he made out, executed, and tendered to the agent of said Medbury and Aldrich, at said Watervliet—one Mr. Daily—the deeds stipulated and agreed upon in said contract, and informed said Daily that this defendant was ready to perform and complete his, this defendant's part of said contract; that on the fourteenth day of April, A. D. eighteen hundred and fifty-five, this defendant met said Medbury and Aldrich at Chicago, in the State of Illinois, at their request, they proposing to complete the terms of said contract, and fulfil the same on their part; that at said meeting Mr. Medbury proposed to give this defendant security by way of mortgage upon one undivided third part of the "Empire Mills," and lots seven, eight, nine, and ten, in block number thirty-two, in the second ward of the city of Milwaukee, as the said additional security for the purchase price of said real estate in Berrien and Van Buren counties, in performance of the conditions of said contract.

And this defendant, further answering, says that on said fourteenth day of April, A. D. eighteen hundred and fifty-five,
48 this defendant delivered *delivered* to said Medbury and Aldrich the deed of conveyance required in and by said contract, of the said real estate in Berrien and Van Buren counties contracted to be sold to them as aforesaid, which said deeds bear date the twenty-seventh day of March, eighteen hundred and fifty-five, and received from them, as part security for the payment of the purchase price thereof, a mortgage bearing date the fourteenth day of April, in the year last aforesaid, collateral to a bond of the same date, conditioned for the payment of the purchase price of said real estate over and above said ten thousand dollars, paid as aforesaid, at the times, for the amount, and in the manner hereinbefore specified, and which mortgage was duly recorded in the office of the register of deeds of the county of Berrien, in the State of Michigan, on the nineteenth day of April, eighteen hundred and fifty-five, as allowed and required by the laws of the State.

And this defendant admits that said John W. Medbery, was, as set forth in said bill, the owner of an undivided third part of the said lots, and the said mill thereon in Milwaukee; and that on said fourteenth day of said April, A. D. eighteen hundred and fifty-five, the said John W. Medbery and Mary R, his wife, executed and delivered to this defendant a mortgage thereon, and that this defendant executed the agreement endorsed on said mortgage as set forth and

averred in said bill; which last mentioned mortgage was duly recorded in the office of the register of deeds for Milwaukee county, on the twenty-first day of April, A. D. eighteen hundred and fifty-five, and is now in this defendants possession, to which this defendant refers himself for greater certainty.

And this defendant further answering, avers that at the time said last mentioned mortgage and the agreement thereon endorsed were given, said Medbery was desirous of giving as he and said Aldrich were bound to do by said contract, additional security for the payment of said first mortgage until the said large saw mill should be built and other large improvements were completed; that he
49 stated he and said Aldrich were going ~~foreclosed~~ on the real estate, by them as aforesaid at said Watervliet, and requested this defendant to agree, that should said Medbery and Aldrich, within two years from that date, properly build and complete said large saw mill, fifty by one hundred and fifty feet in size, upon the foundation commenced in the fall of eighteen hundred and fifty-four at said Watervliet, by driving piles as aforesaid, to accept in place of said last-mentioned mortgage security in proper fire insurance policy or policies on said large saw mill, to be erected as aforesaid, and thereupon to discharge said mortgage, to which this defendant assented, provided the same was built of the size and on the foundation and location as before stated, and said mortgage was thereupon duly executed by said Medbery and his wife, to this defendant, and the agreement thereon endorsed was duly executed by this defendant, being the same set forth in said bill, and this defendant avers and insists that by thus specifying the size and location of said large saw mill, to be erected as aforesaid, he intended amongst other things to prevent any interference with said shop, which the construction of a mill of that size and shape would not have done, and to secure by that size, shape, and location, the most valuable arrangements for a mill of such capacity; and also, that if constructed of that shape, size, and location, it would have admitted of the construction of a safe bulkhead and also of the best railway facilities for passing logs and lumber through the length of the mill from saw carriage to saw carriage and thence, when manufactured into lumber, out of the mill into the lumber yard for market.

And this defendant further says, that the deed to said Medbery and Aldrich for said real estate were executed by this defendant, bearing date the day and year aforesaid, and duly recorded in the register's office in said Berrien county, in the State of Michigan, as allowed and required to be done by the laws of that State, reference to which is here made for greater certainty; that said deeds contained among other reservations, one reserving the shop and
50 water privilege as aforesaid; that before the papers were delivered, they were carefully read over, examined, and compared with the agreements specified in said contracts by said Medbery and Aldrich, or by one of them, with their legal counsel there present, and duly accepted and ratified and the papers consummating the sale duly exchanged; that the bond and mortgage executed

By said Medbery and Alrich for the principal debt bore date the fourteenth day of April, A. D. eighteen hundred and fifty-five, the bond being signed by said Medbery and Aldrich, and the said mortgage by said Medbery and Aldrich, and their wives, which mortgage was duly recorded in the office of the register of deeds for said county of Berrien, on the nineteenth day of said April, in book "G" of mortgages, on pages 168, 169, 170, 171, and 172. This, defendant further answering, avers, that immediately after the delivery of the papers as aforesaid, he left Chicago for New England, and did not return to Michigan until near the latter part of the following winter; that on his return to Watervliet, he found the said shop of his said deaf and and dumb brother cut off from the basement, which was destroyed and gone, and the upper part removed to an almost inaccessible position, some six or seven rods away from its former location, removed from the water power from which it derived its principle value, its fixtures gone or destroyed, and there left in an entirely wrecked and ruined condition, where it still remains, contrary to the express stipulation contained in the said agreements between this defendant and said Medbery and Aldrich, and the covenants and reservations of said deeds, and leaving his said brother, with all his tools and machinery going to waste, without occupation or means thus to support himself, thus entailing upon the defendant the duty and necessity of supporting his said brother in his unfortunate condition, which he has been compelled to do from that to the present time, his means of thus gaining a livelihood by his own labor having been taken from him by the unwarranted removal and destruction of his shop as aforesaid; then it was that this defendant found a new saw mill erected upon a very small portion of the former site of said shop, in consequence of the said mill being built in a different shape and size from
51 the one agreed upon as aforesaid. This saw mill is the only one erected upon the premises sold and conveyed by this defendant as aforesaid to said Medbery and Aldrich since he sold the same to them, and the one erected in the place and stead of the large saw mill hereinbefore referred to; said saw mill now remains upon said premises. It is erected upon other foundations than the one provided and agreed on (and very defective ones) of about sixty feet by sixty feet in size, and it is then extended over a waste water place about eighteen feet, upon another saw mill and its foundation previously built, and in operation prior to the year eighteen hundred and fifty-four, making the said new saw mill as thus erected and under cover about sixty feet wide and seventy-eight feet, long; in length transverse to said foundation as agreed on and begun by driving piles as aforesaid.

And this defendant further answering, denies that the said new saw mill alleged in said bill as having been built upon the foundation referred to in said written agreement, seventy-eight feet by one hundred feet in size, was either built of any such size or upon the foundation as therein stated, or of greater value, or better adapted to the purposes intended, and he denies that said mill was ever properly built or properly completed, or so built with his assent or consent, or

within his knowledge at the time it was so built, and he denies that it was ever accepted, or intended to be accepted by him after seeing the same, as a compliance with said written agreement and the papers connected therewith. On the contrary, he avers that the mill that was built and which is now remaining there was not built of the size stipulated, in the place or location agreed on as aforesaid, nor upon the foundation required by said agreement, which agreement had never been modified or altered by him, and that in consequence of said mill not being built upon that foundation, but upon a different one, this defendant was greatly injured, and sustained damages to a large amount, a fact well known to said Medbery and Aldrich, and each of them, and which this defendant believes was well known to the complainants herein and each of them, when they became interested in the real estate in controversy in this suit. And this
52 defendant further avers, that he has frequently demanded of said Medbery and Aldrich, that they settle with him for the damage done by them to him and to his brother and his brother's business by the unwarrantable removal and destruction of his shop as aforesaid, and taking said water power from him, and to restore to his said brother his legal rights, but said Medbery and Aldrich have positively refused and still refuse so to do. And this defendant avers and charges, from information and belief, that the shape, size, location, and position of the new mill erected by them as aforesaid, were adopted by said Medbery and Aldrich mainly, if not entirely, with the view and intention of destroying said shop and the water privilege connected therewith, to deprive the deaf and dumb brother of this defendant of the use of the same, and at the same time to lessen the expense of properly building and completing so large and valuable a mill as was agreed to be built by them as aforesaid. This defendant knows not and, therefore, can neither admit nor deny that said Medbery is insolvent as alleged in the bill.

This defendant further says, that he has no recollection and therefore denies that said Medbery and Aldrich caused the pretended policies of insurance claimed in said bill to have been effected in the Ætna, Washington, and Jackson Insurance Companies, on said saw mill, to be assigned to him, this defendant, or in any way to be delivered or transferred to him, or that he ever accepted them, or any of them, or in any way assented to them, or any of them, as a compliance with said written agreement, and he denies upon the best of his information, recollection and belief, that he has ever had them or any of them in his possession or under his control. And as to so much of said bill as alleges that, on or about the twelfth day of October, A. D. eighteen hundred and fifty-seven, this defendant caused the large saw mill to be insured in the name of said Medbery and Aldrich for the use, benefit, and security of this defendant, in the Ætna Insurance Company of Hartford, Connecticut, policy No. four hundred and eleven, for the sum of fifteen hundred dollars, in
53 the Washington Union Company, for the further sum of three thousand dollars, and in the Phœnix Insurance Company of Hartford, Connecticut, for the further sum of fifteen hundred dol-

lars, &c.; this defendant answering, says, that from information received by him only within a few days past, after careful search and enquiry, he has ascertained that on the tenth day of October, A. D. eighteen hundred and fifty-seven, owing to their default in making payments, to the ~~shipping~~ of the timber from said lands, the wasting of the securities, and to the neglect of said Medbery and Aldrich to comply in this behalf with the terms and covenants of their said mortgage, and as this defendant had the right to do under the same, he did effect an insurance for his security as mortgagee in the name of said Medbery and Aldrich, upon the saw mills situated upon said premises, in the Ætna Insurance Company of Hartford, Connecticut, for the sum of fifteen hundred dollars, and in the Phœnix Insurance Company of Hartford, Connecticut, for the further sum of fifteen hundred dollars, as by the policy issued by said Phœnix Insurance Company hereunto annexed, marked "exhibit B," to which reference is here made, will more fully appear a true copy of the application and diagram therefor is hereto annexed, marked "exhibit C," to which reference is here made; which said application was after diligent search and inquiry by this defendant found on file in the general office at Cincinnati, Ohio, of the Phœnix Insurance Company of Hartford, Connecticut, on which both said policies were predicated and made a part thereof. This defendant further answering, says, that when making the application for said insurance, he accidentally, and for the first time learned that Messrs. Medbery and Aldrich had themselves effected an insurance on said mills for the sum of three thousand dollars in the Washington Union Insurance Company of Cleveland, Ohio; that that fact was before unknown to this defendant, and it became necessary for him, as an applicant for additional insurance, after receiving such information, to give notice thereof in his said application for insurance. And this de-
54 fendant avers that he never effected any insurance or caused any to be effected for himself or any other person in the said Washington Union Insurance Company on any of said property. And as to the averment that this defendant, at about the same time, insured the grist mill on the lands and premises mentioned in said mortgage from said Medbery and Aldrich, &c., this defendant answering, says, he did cause said grist mill to be insured for the sum of one thousand dollars, and no more, in the said Ætna Insurance Company, (and for no sum whatever in any other Insurance company,) for one year, in the name of said Medbery and Aldrich, but for the security of this defendant as mortgagee as he was authorized to do, by the terms of said last mentioned mortgage, the said Medbery and Aldrich not having insured it for his benefit and security as required by the terms of said mortgage. He further admits that said grist mill was burnt during the life of said insurance, and that he collected the insurance money of said Ætna Insurance Company, to the amount of one thousand dollars and no more, and applied it as required by said mortgage.

As to the averment, that about the twenty-seventh of September, eighteen hundred and fifty-eight, this defendant caused the

said large saw mill and other buildings situate on the premises, to be insured, &c., this defendant admits that he did so somewhere about that time, owing to the loss of the grist mill, to the continued default of payments, and to the continued neglect of said Medbery and Aldrich to comply, in this behalf, with their said mortgage, and in the exercise of this defendant's rights under the same; and this defendant says, that the insurance which he, this defendant effected as aforesaid, was not effected as alleged, with the consent of said Medbery and Aldrich, or their assigns, but only on the motion of this defendant, and without their knowledge or consent, this defendant acting in the premises solely under the said mortgage of Medbery and Aldrich. As to the allegation, that on or about the twenty-seventh of November, eighteen hundred and fifty-eight, the said Medbery and Aldrich paid this defendant the sum of fifteen thousand, two hundred and thirty-six dollars and six cents, in
55 which amount was included the amount paid by said defendant for insurance premiums, &c., this defendant says, he admits he had an accounting with Joseph Carr and William Aldrich, the assigns of said Medbery and Aldrich, on that day. He does not remember the items of the account, the vouchers of said account having been then delivered up by him to said Joseph Carr and William Aldrich. He is sure, that on that occasion, he applied only the sum of fourteen thousand six hundred dollars and forty-three cents on said mortgage; and he leaves the complainants to make such proof of this allegation as they shall be advised.

As to the averment, that during the building of the said large saw mill this defendant was present from time to time, and was then and there asked to consent to the deviations from the terms of said agreement, and that he then and there agreed to accept the mill in lieu of the one mentioned in said agreement, &c., this defendant says, that the whole of said averment is untrue; that during the erection of said mill building, he was out of the State of Michigan, as hereinbefore stated by him, and without any knowledge of said deviation, but that the moment he learned of such deviation, he objected and protested against it, and never consented or intended to consent to it at all, as a compliance with the terms of said agreement.

This defendant admits, that he, by regular formal legal proceedings in the circuit court of Berrien county, Michigan, foreclosed said mortgage against said Medbery and Aldrich, and their wives, and obtained a regular decree of sale of the mortgaged premises, which, after due notice as required by the rules and practice of the court, took place on the fifteenth day of April, eighteen hundred and sixty-three, after consenting to a postponement of the sale for two weeks to accommodate said complainants, or their agents, Messrs. Whaling and Haight, acting for the interests of the complainants in this suit, and at which sale this defendant, and Galen M. Fisher and Burrell A. Olney, the higest bidders, became the joint purchasers of the mortgaged premises, each purchasing an undivided third part thereof, to whom they were struck off at auction, at the sum of nineteen thousand
56 six hundred dollars, the highest sum offered therefor, although

the said complainants, or parties interested in their behalf, were present and represented at said sale; which sale was in all respects fair, equitable, and legal, and was duly confirmed by an order of the court, but which did not satisfy the decree of forclosure, the balance remaining due thereon, being the sum of two thousand eight hundred sixty-four dollars and forty-seven cents, which, with interest at ten per cent per annum, and a large amount paid by this defendant for taxes still remain due to this defendant on the bond and mortgage given him by said Medbery and Aldrich, and on said decree of foreclosure, and is, as this defendant insists, secured by said mortgage from said John W. Medbery, & his wife, to this defendant, on the lots in Milwaukee; this defendant, for greater certainty, referring to the record of said foreclosure proceedings.

As to the averment, that this defendant agreed with said Fisher & Olney, that the three should become the purchasers of the premises at a small amount, and less than the amount due upon decree, &c.; this defendant says, he made no such proposal, nor was any such agreement entered into, but that the three did agree, prior to the sale, to bid jointly, but not to bid above the amount of twenty thousand dollars, and that if any other person should bid to the amount of twenty thousand dollars, they would not compete but let the property be sold to such bidder; that the highest adverse bid was only to the amount of nineteen thousand five hundred dollars, which bid was made by said Mr. Haight, who was a former owner of and interested in the title to the same property mentioned in the bill as the Empire mill in Milwaukee; nor have the said Fisher and Olney, or either of them, paid or ageed to pay to this defendant, as alleged in said bill for said mortgaged property sold as aforesaid, an amount, which, with the interest of said defendant in the said foreclosed mortgage, would equal the amount due thereon at the time of said sale; the said Fisher and Olney have each accounted to this defendant for one undivided third part of said premises, in the sum of six thousand five hundred and thirty-three and one-third dollars,
57 and no more. This defendant admits that a demand was made upon him to execute and deliver a release or satisfaction of said mortgage in the Empire mill premises, at the time and in the manner set forth in said bill in this behalf, and that he refused and still refuses to release the same, or in any way declare it satisfied, for the reason, that there still remains justly due to him the balance above mentioned in the said decree of foreclosure, and certain monies paid by this defendant, as aforesaid, for taxes on said premises before said sale, for the payment, whereof, thepremises last mentioned in Milwaukee are justly held under the mortgage in controversy, as he has been advised.

And this defendant, in answer to the eighth special interrogatory, says, as he has hereinfore said, that he has within a fews days past, after diligent search and inquiry, ascertained, by seeing the original application for insurance, which enabled him to trace it out; that he did effect an insurace in the name of said Medbery and Aldrich, upon the saw mills upon said premises at Watervliet, Berrien county,

Michigan, on the tenth day of October, A. D. eighteen hundred and fifty-seven, and not the twelfth, as stated in said bill, by one policy in the Ætna Insurance Company of Hartford, Connecticut, for fifteen hundred dollars, which policy this defendant has lost or mislaid, and he has not, after diligent search, been able to find the same, nor has he any knowledge, information or belief as to what has become of the same; and, also, by one other policy, numbered two, in the Phœnix Insurance Company of Hartford, Connecticut, also, for the sum fifteen hundred dollars, which he has found, and annexes, hereto, as exhibit B, as aforesaid, and refers thereto for greater certainty; which saw mills were described in said application, a copy whereof is, as hereinbefore stated, hereunto annexed, marked as exhibit "C," as follows, viz:

"Wood, 1 rebuilt in 1850, of wood, 26 by 110 feet, 2 stories high. The other built in 1855, of wood; size, about 60 by 60 feet, 2 stories high." He further says, that he has not in his possession, nor under his control, the policies of insurance mentioned in the ninth special interrogatory, nor has he any knowledge, information, or belief, as what has become of them, and cannot, therefore, attach copies thereof, to his answer; nor can he at present state, with any degree of certainty, the names of the companies in which they were obtained, but which he believes may be assertained from the vouchers surrendered by said defendant, on the settlement or accounting, hereinbefore mentioned as having taken place on the twenty-seventh of November, A. D. eighteen hundred and fifty-eight.

In answer to to the twelfth special interrogatory, he says, a grist mill was erected by some persons, and, as he thinks, by the grantees or assigns of said Medbery and Aldrich, at the time mentioned upon said premises, about thirty feet by forty feet in size, which is just one half the size of the one burned, but he knows not of what value, and he believes that it still remains upon said premises.

In further answer to the said sixth special interrogatory, this defendant says that there was a saw mill partly, but not properly built, and never fully completed on said premises at Watervleit. He cannot state whether the same was built and completed within the time specified in said agreement or not; that said mill was of the dimensions of about sixty feet by sixty feet in size, upon what is properly its own foundation, though a poor one, and then extended over a waste water place about eighteen feet, and resting on another mill, built in the year eighteen hundred and fifty, making said new mill of the size of about sixty feet in width by seventy-eight feet in length, as extended over on to the other mill; that attached to said mill he believes there was a platform, or a kind of dock on the down stream side of said mill, upon which to pile and from which to ship lumber. He does not know that any part of said mill is not under cover. He thinks said platform or dock is not under cover, and if that is what is termed in said bill "that portion of the mill not under cover," then he is unable to give its dimensions, as he has never measured it, and has a very indistinct idea of its size. He does not consider it any part of

the mill, but merely a platform or dock as aforesaid, from which to ship lumber. The dimensions of the mill he has already given, as about sixty feet by seventy-eight feet in size, including that
59 part built on to, and attached to one built in ~~1860~~, being that part under cover, which is the size of the mill. This defendant does not estimate said new mill in the shape and size in which it was built by said Medberry and Aldrich, at half the value it would have had if properly built, and completed of the size of fifty feet wide by one hundred and fifty feet in depth, on a good and proper foundation of its own, (which the said new mill has not,) with a proper, substantial, and tight bulkhead, (which said mill has not.) He further says, that he has been informed and verily believes the bulkhead there constructed has always been imperfect and dangerous, and a source of damage and great anxiety for its safety, and on account of its failures, to its owners; that said mill is not, in his estimation, nearly as well adapted for the purpose and business intended, as if it had been built fifty feet by one hundred and fifty feet in size.

This defendant cannot state when said mill, as built, was completed, as he does not know that fact. The frame of that mill was erected and enclosed while he was absent in New England, in eighteen hundred and fifty-five, as aforesaid, and he is not able to state, even approximately, what was its value when the premises were sold on said foreclosure, owing to its being greatly out of repair, decayed, and stripped of its fixtures, its machinery being broken, &c. He says that said mill, as built, was never assented to or accepted by this defendant as a compliance with said written agreement.

In further answer to said 14th special interrogatory, this defendant says he admits that he has been paid, and has received from all sources, to wit, from said Medbery and Aldrich, and their assigns, and on account of insurance, as appears by the endorsements on the bond, upon the mortgage executed by said Medbury and Aldrich, for principal and interest up to and before the day of the sale of the mortgaged premises, on the fifteenth day of April, A. D. eighteen hundred and sixty-three, the said several sums, all duly endorsed on said bond, amounting, in the aggregate, to thirty-seven thousand and ninety dollars and fifty-nine cents, ($37,790 59.) As to the amount
60 expended in improvements, and in the building of said saw mill, he has had no means of knowing, and cannot say; neither can he say how much the improvements, so called, were worth at the time of said mortgage sale, in dilapidated, stripped, decayed, and broken condition they were in. The amount claimed to be due, under the decree of foreclosure of the mortgaged premises, on the fifteenth day of April, A. D. eighteen hundred and sixty-three, the day of the sale thereof, was twenty-two thousand four hundred and sixty-four dollars and forty-seven cents, ($22,464 47-100,) and there were some subsequent costs of confirmation of sale, &c., and previous taxes on the said premises, due and unpaid, that had to be settled, the amount of which said defendant has not at present the means of ascertaining, and, therefore, cannot now state; that on said last-men-

mentioned day, the premises and property described in said mortgage and decree, were all sold, subject, of course, to whatever of equity was against them, to Galen M. Fisher, Burwell A. Olney, and this defendant, for the sum of nineteen thousand six hundred dollars; that the actual value of said property did not seem to exceed that sum, as the sale thereof was legally advertized and widely known, and competition was open to all who chose to attend and bid at said sale. Parties were present at said sale and bid freely for the mortgaged premises, who represented themselves interested in the real estate in Milwaukee, in controversy in the present case, and at whose request the said defendant had consented to the postponement of the sale, and did postpone the same for two weeks in order to give them abundant time to examine the property, which they did, and prepare for the sale.

As to "what improvements in mills, buildings, or otherwise, were made, erected, and placed upon the premises," &c., this defendant cannot state precisely. When the property was sold to said Medbery and Aldrich, it embraced within its limits a first-rate grist mill, that always did good work, which was burned after it went into their possession, and the insurance money received therefrom, to the amount of one thousand dollars, placed to their credit by this defendant, on account of the moneys due him upon said purchase.

61 That in place of said grist mill another was erected, he believes, of just half its size, and of inferior construction and workmanship, that was never able to do its work well, as defendant has been informed and verily believes, and which has, for the last two or three years, done no work at all, and before said sale was even stripped of its bolting clothes, and a great part of its fixtures and machinery. A large barn and shed upon said premises, without insurance, were burned, and another barn erected of about half the size of the barn that was burned; said Medbery and Aldrich caused to be torn down and removed from their foundations and destroyed a saw mill, and the shop reserved for the deaf and dumb man, as aforesaid, and erected in their places in part a saw mill of ~~insurance~~ foundations, and so placed as to make it very difficult, if not impossible, to secure a safe bulkhead for it, which, at the time of said foreclosure and sale, was stripped of much of its machinery, and much had become wasted, decayed, and injured from want of care. The dams and embankments, booms, head-gates, waste-gates and bulkheads, were all broken away and destroyed, and the ~~herd~~ and tail-races nearly filled up with earth and floodwood; that of his own knowledge, and from reliable information, he verily believes, that from twelve to twenty millions of ~~best~~ of lumber, mostly of its most valuable pine, which would have been worth, at the time of said public sale, with the mills in good order to make into lumber, from sixty to one hundred thousand dollars, had been cut, severed from the premises, and taken away, of which particulars the value of said property was, in his estimation, very much lessened, after it passed into the hands of said Medbery and Aldrich. As to what was the cost of said improvements this defendant has no means of knowing, and therefore, cannot

state. Such improvements as are above mentioned were "still remaining upon said premises at the time of said sale," and embrace the principal items this defendant can now think of in the way of improvements. This defendant further avers, that said Medbery and Aldrich, and their grantees and assigns, have, as hereinbefore alluded to, committed and allowed great waste and damage upon
62 said lands and premises, by removing the valuable timber therefrom, and doing other acts prohibited by law, or by the terms of their said mortgage, and that, from want of their proper care, the said premises were greatly damaged by fire and floods, by general dilapidation and decay, and by the removal of almost everything that could be severed from the freehold; that by their neglect in paying the taxes imposed thereon, many of said lands had been sold for taxes, and the time for redemption of some of them expired, and tax titles given to the purchasers of the same, under color of which they have been stripped and wasted of much of their valuable timber, and possession thereof withheld from those claiming under the foreclosure of the mortgage of said Medbury and Aldrich, and that nearly all of said lands would have been thus sacrificed had not this defendant repeatedly redeemed them after their sale for taxes. So that for the above reasons the premises and property mortgaged by said Medbury and Aldrich to secure said purchase money, were far less valuable at the time of said foreclosure and sale, than when conveyed to them by this defendant. All which matters and things this defendant is ready to aver and prove, as this honorable court shall direct, and prays to be hence dismissed, with his reasonable costs and charges in this behalf sustained.

ISAAC N. SWAIN.
FINCHES, ~~LYNCH~~ & MILLER,
Solicitors & of Counsel for Def't.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac N. Swain, of the city of Detroit, in the county of Wayne, and State of Michigan, being duly sworn, says that he is the defendant in the foregoing answer named; that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and that as to those matters this deponent believes it to be true.

ISAAC N. SWAIN.

Sworn and subscribed before me, this 18th day of March, A. D. 1864.

ADDISON MANDALL.
United States Commissioner for the East Dist., Mich.

[Stamp.]

63 *Exhibit "A."*

Memoranda of an agreement made in duplicate at Watervleit, in the county of Berrien, and State of Michigan, this twenty-eighth day

of September, A. D. 1854, between Isaac N. Swain, of Watervleit, aforesaid, as party of the first part, and John W. Medbury, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the state of Illinois, of the second part, witnesseth, as follows, to wit :

I. The party of the first part agrees to sell to the party of the second part all those certain pieces or parcels of land, with the fixtures and appurtenances thereunto belonging, situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, viz :

The northwest fractional quarter of section number nine, (9,) in township No. three, (3,) south of range No. sixteen (16) west, containing, according to the United States survey, one hundred and ninety three and fifteen hundredths (193 15-100) acres of land, more or less. Also, the west half of the northeast quarter of section number seventeen, (17,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, eighty (80 acres of land, more or less. Also, the west fractional part of the southwest fractional quarter of sec. No. seven, (7,) in township No. three, (3,) south of range No. sixteen (16) west, containing, according to the United States survey, forty-eight and twenty-hundredths (48 20-100) acres, more or less. Also, the southeast quarter of the southwest fractional quarter of sec. No. seven, (7,) in township No. three, (3,) south of range No. sixteen (16) west, containing, according to the United States survey, forty (40) acres, more or less. Also, the west half of the northwest fractional quarter of sec. No. eighteen, (18,) in township No. three, (3,) south of range No. sixteen (16) west, containing, according to the United States survey, sixty three (63) acres of land, more or less. Also, the northeast fraction of the northeast fractional quarter of sec. No. eighteen, (18,) in township No. three, (3,) south of range No. sixteen (16) west, containing, according to the United States survey, one hundred and twelve and fifty-hundredths (112 50-100) acres of land, more or less. Also, the north fraction of the northeast fractional quarter of sec. No. eighteen, (18,) in township No. three, (3,) south of range
64 No. sixteen (16) west, containing, according to the United States survey, twenty-one and seventy-hundredths (21 70-100) acres of land, more or less. Also, the ~~west~~ East half of the northeast quarter of sec. No. thirteen, (13,) in township No. three, (3,) south of range No. seventeen (17) west, and containing, according to the United States survey, eighty (80) acres, more or less. Also, the southeast fraction of sec. No. fourteen, (14,) in township No. three, (3,) south of range No. seventeen (17) west, containing, according to the United States survey, three and fifty-three hundredths (3 53-100) acres, more or less. Also, the east half of the northeast quarter of sec. No. twenty-two, (22,) in township No. three, (3,) south of range No. seventeen (17) west, according to the United States survey, eighty (80) acres, more or less. Also, the southwest fractional quarter of the northwest fractional quarter of sec. No. twenty-three, (23,) in township No. three, (3,) south of range No. seventeen (17) west,

containing, according to the United States survey, thirty-nine and forty-hundredths (39 40-100) acres, more or less. Also, the east half of the northwest fractional quarter of sec. No. twenty-three, (23,) in township No. three, (3,) south of range No. seventeen) (17) west, containing, according to the United States survey, sixty-nine and fifteen hundredths (69 15-100) acres, more or less. Also, the undivided one-half of the northeast fractional quarter of sec. No. twenty-three, (23,) in township No. three, south of range No. seventeen (17) west, containing, according to the United States survey, one hundred and sixty acres, more or less; less by the bed and bank of the Paw-paw river, as meandered and surveyed by the United States. Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township No. three, (3,) south of range No. seventeen (17) west, as lies north of the centre of the main public highway, or road leading from Paw-paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervleit, aforesaid, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres of land. Always excepting and reserving those certain pieces or parcels of land situated in and being parts of the above-described southwest fractional quarter of said sec. No. twenty-three, (23,) and north of said public highway or road; and also reserving certain other rights and privileges, as hereinafter described and specified: that is to say, of said reserves. For the purpose
65 of more conveniently describing said pieces or parcels of land excepted and reserved, be it known, that on the south line of said sec. No. twenty-three, (23,) and four (4) chains and fifty-eight links east of the southwest corner of said section No. twenty-three, (23,) is a stake, which we will call a "Point No. one," in the centre of Main street, (so called,) being the main public road leading from said "Point No. one;" thence north 6½ degrees east, towards the Watervleit mills, (so called,) in said township of Watervleit, aforesaid, viz: First, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, nine (9) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. one;" thence north eighty-three and a half (83½) degrees, west two (2) chains and forty (40) feet; thence north (6½, six and a half degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south 6½ degrees, west along said centre of said Main street one (1) chain to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances. Also, second, a a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, eleven (11) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "point No. one;" thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½, east two (2) chains and forty (40) feet to the said centre of said Main street;

thence south 6½ degrees, west along said centre of said Main street, one (1) chain to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

Also, third, a certain piece or parcel of land excepted and reserved from the sale; known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, thirteen (13 chains and forty-seven and a half (47½) links north, 6½ degrees east from said "point No. one;" thence south 83½ degrees, east five (5 chains and forty (40) feet; thence north 6½ degrees, east two (2) 66 chains; thence south 83½ degrees, east seven (7) chains and fifty links; thence north 6½ degrees, east four (4) chains; thence north 83½ degrees, west seven (7) chains and fifty (50) links; thence south 6½ degrees, west three (3) chains; thence north 83½ degrnes, west five chains (5) and forty (40) feet to the centre of said Main street; thence south 6½ degrees, west along the centre of said Main street three (3) chains to the place of beginning, containing four (4) acres and sixty eight hundredths (68-100) of an acre of land, with its appurtenances.

Also, fourth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, fourteen (14) chains and forty-seven and one-half (47½) links, north 6½ degrees ~~and~~ east from said "point No. 1;" thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south 6½ degrees, west along the centre of said Main street one (1) chain to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

Also, fifth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street sixteen (16) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. one" (1;) thence north 83½ degrees, west 2 chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south 6½ degrees, west along the centre of said Main street one (1) chain to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

Also, sixth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, seventeen (17) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. one," thence south 83½ degrees, east 67 one hundred and seventy-six (176) feet to the top of the west bluff or hill along mill creek; thence north 6½ degrees, east sixty-six (66) feet; thence north 83½ degrees, west one hundred and seventy-six (176) feet to the centre of said Main street, 6½ degrees west, sixty-six (66) feet to the place of beginning, con-

taining twenty-eight hundredths (28-100) of an acre of land, with its appurtenances.

Also, seventh. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, nineteen (19) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. 1;" thence south 83½ degress, east two (2) chains and forty (40) feet, or to the top of the bluff on the west side of Mill creek; thence north 6½ degrees, east one (1) chain along the top of said bluff; thence north 83½ degrees, west four (4) chains and eighty (80) feet; thence south 6½ degrees, west one (1) chain; thence south 83½ degrees two (2) chains and forty (40) feet to the centre of said Main street the place of beginning, containing fifty-two (52-100) hundredths of an acre of land with all its appurtenaces.

Also, eighth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, twenty-one (21) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. 1;" thence south 83½ degrees, east four (4) chains; thence north 6½ degrees, east one (1) chain; thence north 83½ degrees, west eight (8) chains and forty (40) feet; thence south 6½ degrees, west one (1) chain; thence south 83½ degrees, east (4) four chains and forty (40) feet to the centre of said Main street the place of beginning, containing ninety-two hundredth (92-100) of an acre of land, more or less, with its appurtenances.

Also ninth. A certain price or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, twenty-three (23) chains and forty-seven and a half (47½) links north,
68 6½ degrees east from said "Point No. one;" thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south 6½ degrees, west along the centre of said Main street, one (1) chain to the place of beginning, containing twenty-six hundredth (26-100) of an acre of land, more or less, with its appurtenances.

Also, tenth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of Main street, twenty-four (24) chains and forty-seven and a half (47½) links north, 6½ degrees east from said "Point No. one;" thence south 83½ degrees, east two (2) chains and twenty-five (25) links; thence north 6½ degrees, east three (3) chains; thence north 83½ degrees, west two (2) chains and twenty-five (25) links to the centre of said Main street; thence south 6½ degrees, west three (3) chains along the centre of said Main street to the place of beginning, containing sixty-eight hundredth (68-100) of an acre of land, with its appurtenances.

Also, eleventh. A certain piece or parcel of land, excepted and

reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the centre of said Main street, twenty-five (25) chains and seventy-five (75) links north, 6½ degrees east from said "Point No. one;" thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two chains and forty (40) feet to the centre of said Main street; thence south 6½ degrees, east along the centre of said Main street one (1) chain to the place of beginning, containing twenty-six hundredth (26-100) of an acre of land, more or less, with its appurtenances.

Also, twelfth. A certain piece or parcel of land, excepted and reserved from this sale, known and described as being a small lot two (2) rods wide and six (6) rods long, on which is situated the blacksmith shop, now owned by R. N. Vanattue, and which lot was sold on or about the twelfth day of September, A. D. 1850,
69 and deeded by said Swain and his wife to Henry R. Holland, reference being had to said deed will more fully show, containing twelve (12) square rods of land, with its appurtenances.

Also, thirteenth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake standing on the south meandering line of the Paw Paw river, as surveyed by the United States, and forty (40) feet east of the centre of said Main street; thence south 6½ degrees, west three (3) chains and thirty-three and a third (33⅓) links; thence south 83½ degrees, east one (1) chain and fifty (50) links; thence north 6½ degrees, east parallel with the line of said Main street to the south meandering line of said Paw Paw river; thence northwesterly along said south meandering line of said Paw Paw river to said stake, the place of beginning, containing one half an acre of land, with its rights and appurtenances.

Also, fourteenth. A certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a point seventy-five (75) links north (or very near it) of the centre of said public highway or road aforesaid, leading from Paw Paw to St. Joseph, as surveyed by said Jehiel Enos, and recorded as aforesaid, which point is the southwest corner post of ground cleaned off and fenced for a burying ground, and is about eleven (11) chains and eighty (80) links west of the east line of said southwest fractional quarter of said sec. No. twenty-three (23;) thence north five (5) degrees, west five (5) chains and seventy-one (71) links; thence north eighty-four (84) degrees and fifty (50) minutes, east four (4) chains; thence south five (5) degrees, east four (4) chains and twenty-nine (29) links, to a point seventy-five (75) links from the centre of said highway or road last aforesaid; thence south seventy (70) degrees, west along parrallel with the centre of said raid or highway last aforesaid, to said point or place of beginning, containing two (2) acres of land, with the right and appurtenances thereto belonging; and it is understood and agreed by the parties to this agreement, that school district No. two (2,) in the town-
70 ship of Watervliet aforesaid, which owns the school-house

upon said premises, is to have the use of the ground fenced out around the same of one (1) square chain, so long as said district desires and may occupy said school-house for school purposes, or may move the same, then this reserve for the use of said ground, to be fully complete and ended.

Also, it is understood as aforesaid, and agreed, that a small building owned and occupied by James W. Redding for a "variety store," situated on premises included in this sale, is excepted and reserved from this sale, and may stand where it does while convenient to the owners of the land it stands upon, at a reasonable rent, or to be removed on giving the owner of the building reasonable notice to do so without any let or hindrance whatever.

Also, it is understood as aforesaid, and agreed, that the use and occupancy of the house, out-houses, and fixtures, and premises enclosed therewith, where said Swain now resides with his mother, brothers, and sister, is excepted and reserved by said Swain for his benefit for one year from date hereof, then to be fully complete and ended, and surrendered with the premises above conveyed; and also, the use and occupany of the shop, building, and fixtures connected with the same, where Russel Swain, a deaf mute, now occupy, together with the use of the water as now used, or in a similar way, so long as said Russel Swain chooses or desires, and shall occupy the same free of any rent, let, or unnecessary hindrance, otherwise, than, if in the way of other important improvements, may be removed sufficiently to be reasonably out of the way, and where he can have the same use and privileges as before; and when said Russel Swain is done with it, or abandons it not to occupy any more, then this reserve is to terminate, and be fully complete and ended.

II. The parties of the second part for themselves, their heirs, executors, administrators, and assigns, agree to pay to the party of the first part, for the lands above described, and not reserved from this sale, with the rights, privileges, and appurtenances there-
71 with belonging, the just and full sum of fifty thousand dollars, ($50,000 00,) in the manner following, to wit, ten thousand dollars ($10,000 00,) on the delivery of this contract, or within ninety (90) days from date hereof, with interest, and the balance of forty thousand ($40,000 00) in eight (8) equal annual instalments of five thousand dollars ($5,000 00,) each, with lawful interest from the date hereof, to be paid annually on the whole sum remaining due or unpaid in each year, at the rate of seven (7) per centum per annum, and the said party of the second part, shall also pay and discharge all taxes from this date upon said premises hereby sold.

III. It is agreed and understood by the parties to this agreement, that after the payment of the said ten thousand dollars, ($10,000 00.) then, or within ninety days thereafter, said party of the first part agrees to execute or cause to be executed to the parties of the second part, their heirs or assigns, a good and sufficient warranty deed for the said lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging, upon and at the same time the said parties of the second part

shall execute to said party of the first part good and satisfactory security upon other property for the amount of six thousand six hundred and sixty-six and $\frac{2}{3}$ dollars ($6,666 $\frac{2}{3}$;) and also their bond, and a good and sufficient mortgage upon the lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereto belonging, conditioned to pay to said party of the first part, the said forty thousand dollars ($40,000 00,) as above stated in eight equal annual instalments of five thousand dollars ($5,000 00 each, and interest as above stated; and also, for any amount at any time remaining over due and unpaid, the same shall be considered as money loaned and bearing interest thereon at the rate of ten per centum per annum, which interest shall also be paid annually.

It is, also, agreed by the parties as aforesaid, that said parties of the second part shall keep an insurance in some safe insur-
72 ance company upon the insurable property upon said premises for at least one-third their value for the benefit and security of said party of the first part, to be paid over in case of losses to said party of the first part as payment on the purchase money; that there shall be no unreasonable strip or waste upon the premises, further than the purchase money is paid so as to in anywise impair the securities.

Said party of the first part having a tax deed of the other undivided one-half of the northeast quarter of section twenty-three (23), in township three, south of range seventeen (17) west, agrees to make and execute to said parties of the second part at the same time of giving the warranty deed of the other lands, a quit-claim deed of the same, which land shall also be included in their mortgage above stated, and also to quit claim to said parties of the second part all his right of flowage upon any land he may have in consequence of raising the dam ~~in~~ the Paw Paw river, in said section No. 23 aforesaid; and also, all his rights by acts of the legislature of the State of Michigan for constructing and maintaining said dam, all which grants shall be included also in the mortgage aforesaid, to be executed by said parties of the second part to said party of the first part for security of the purchase money. Said Swain is to have all reasonable time and privilege to take care of, and dispose of, all his personal property on said premises, and said Medbery and Aldrich to have possession of the mills and the new store at once, and the other possessions as soon as convenient to vacate them reasonably.

In testimony whereof, the parties have hereunto set their hands the day and year first above.

(Sig'd) ISAAC N. SWAIN.
(") JOHN W. MEDBERY.
(") JAMES F. ALDRICH.

Received, Watervliet, Sept. 30th, 1854, to apply on this contract of James F. Aldrich, three thousand three hundred and eighty dollars, for which I have given him a receipt. Also, of John W. Medbery, also to apply on this contract, three thousand three
73 hundred and thirty-three and 33-100 dollars, which I have

given him a receipt for, making in all, six thousand seven hundred and thirteen 33-100 dollars, ($6,713 33-100.)

(Sig'd) ISAAC N. SWAIN.

Whereas, in the great hurry and confusion of drawing up and completing, as supposed, the within and foregoing contract, Mr. Aldrich wishing to leave hurriedly for the purpose of taking the cars for home on Saturday evening, September, 10th, 1854, important items of the agreement were out of said contract, which of right ought to have been in; therefore be it known, and added to the within and foregoing contract, that it was agreed, and is hereby agreed by the parties to said contract, that in consideration for the building of the new store on said premises, and for the materials now on hand, for it included in the items and account rendered, and work and labor done for that store, there was to have been paid, by said parties of the second part, to said party of the first part, the further sum of two thousand and four hundred dollars in the annual instalment of one and two years from that date, with interest.

It is, therefore, agreed by the undersigned, parties to said contract, that said amount of two thousand and four hundred dollars, shall be added to the amount of the bond and mortgage within mentioned conditioned to be paid as above stated; and it is, also, further agreed, that said parties of the second part are to have the saw logs now on hand, belonging to said party of the first part, at what they have cost him for those he has purchased in the log, as per accounts of purchase, and for all others on hand, for and at the rate of three dollars per thousand feet, as usually measured, for all which said logs, said parties of the second part agree to pay said party of the first part, in six months from date, with interest.

Dated at Watervliet, October 2nd, 1854.

(Sig'd) ISAAC N. SWAIN.
(") J. W. MEDBERY.
(") J. F. ALDRICH,
By J. MEDBERY.

Rec'd on the foregoing contract, December 28th, 1854, three thousand and three hundred and forty-four and 18-100 dollars to apply in the first payment, ($3,344 18).

Sig'd) ISAAC N. SWAIN.

74 *Exhibit B.*

Phœnix Insurance Co., of the city of Hartford.

No. 2. $1,500.

By this policy of insurance the Phœnix Insurance Company, in consideration of sixty dollars to them in hand paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbury and Aldrich, of Watervliet, Michigan, for the use, benefit, and security of Isaac N. Swain, of Palmer, Massachusetts,

against loss or damage by fire, to the amount of fifteen hundred dollars, on the saw mills situate in the town of Watervliet, in the county of Berrien and State of Michigan, more particularly described in application No 2, and the accompanying diagram on file in this office.

The Phœnix Insurance Company have notice of other insurance on the said mill, as follows, viz: three thousand dollars in the Washington Union Company, of Cleveland, Ohio, and fifteen hundred dollars in the Ætna Insurance Company, of Hartford, Connecticut.

And the said company, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the tenth day of October, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) unto the tenth day of October, one thousand eight hundred and fifty-eight, (at 12 o'clock at noon;) the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen, and to be paid within 60 days after due notice and proof thereof, made by the insured and received at this office, in conformity to the conditions annexed to this policy: Provided, always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of the invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft, at or after a fire; and provided, further, that in case the assured, or any other persons or parties, with the knowledge of the assured, shall have existing, during the continuance of this policy, any other insurance against loss by fire in the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover in this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises shall, at any time after the making of and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous, or extra hazardous, or specified in the memorandum of special hazards, in the terms and conditions annexed to this policy, or for the purpose of storing therein any of the articles, goods, and merchandise in the same terms and conditions denominated hazardous, extra hazardous, or included in the memorandum of special hazards, except herein specially provided for, or hereafter agreed to by this company in writing, to be added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect.

And it is, moreover, agreed and declared, that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidence of title to lands, nor to bonds, bills, notes, or other evidence of debt, nor to money or bullion.

And this policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise especially provided for.

This insurance (the risk not being changed) may be continued for such further term as shall be agreed on, provided the
76 premium therefor is paid and endorsed on the policy, or a receipt given for the same. The interest of the insured in this policy is not assignable, unless by consent of this company, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy from thenceforth shall be void and of no effect. This policy shall not be valid until countersigned by the authorized agent of said Phœnix Insurance Company, at Niles, Mich.

In witness whereof, the Phœnix Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford.

S. L. LOOMIS, *President.*

H. KELLOGG, *Secretary.*

Countersigned at Niles, this 10th day of October, 1857.

R. C. PAINE, *Agent.*

Classes of hazards.

Not hazardous.—Staple foreign dry goods in packages, and staple domestic dry goods, in stores, where no hazardous merchandize is kept; and household furniture in dwelling houses, may be insured at five cents per $100, in addition to the rate of the building.

Hazardous.—The following trades and occupations, goods, wares, and merchandise are deemed hazardous, and subject the building and all its contents to an additional charge of 10 cents per $100. They are: china, or earthen, or glass ware, or plate glass, in boxes, crates, or casks; eating houses, or refectories; fire crackers in packages, flax in bales; grocers' stock; gutta percha, manufactured; hat ironing, or trimming, or pressing; hay, pressed in bundles; hemp, in bales; India rubber, unmanufactured; manilla grass, in bales; oil; porter houses; rags, in packages; sail making; segar making; Sisal grass, in bales; spirituous liquors; sugars; sulphur; tallow; taverns; wine dealers' stock, (not including wine in glass, unpacked,) and wool.

The following are considered hazardous, on account of their liability to damage, and are charged 10 cents per $100, in addition to, but does not increase the rate of, the building. They are: boots and shoes; brushes, (stocks of;) card printing; coffee; cotton batting and wadding; dry goods, (general stocks of;) flour; furs and

77 peltries, in packages; hardware and cutlery; hides and leather; indigo; looking-glasses, in boxes; metals, (in bars, rods, pigs, and sheets;) paints, ground in oil; paper hangings; paper, in reams; potash; rice; spices; tailors' stock, and ready-made clothing; threshed grain; tin, or sheet iron, or copper ware; wine, in casks; wine in glass, in packages; window or plate glass, in boxes; and generally all other stocks of merchandise (in buildings where fire heat is not used for manufacturing,) not elsewhere enumerated.

Extra hazardous.--The following trades and occupations, goods, wares, and merchandize are deemed extra hazardous, and subject the building and all its contents to an additional rate of 20 cents per $100. They are: alcohol; apothecaries' stock; band box and paper box making; basket bleaching or making; basket sellers' stock; blacksmithing; block and pump making; box repairing; brass turning and working; brush makers' stock; cabinet makers' stock; carving china, earthen, or glass ware, or looking-glass, with packing or unpacking; chocolate making; colorman's stock; coopering; copper-plate printing; cotton, in bales; cotton brokers' samples; daguerreotyping; drugs, (importers' stock, without inflammable acids or phosphorous;) essential oils; gilding; gutta percha goods; gun repairing; hat finishing, (with use of fire heat to steam and block the bodies;) India rubber goods; lamp manufacturing; lime, unslaked; liquor, bottling; lithographing; morocco manufacturing; musical instrument makers' stock; oakum, in bales; painters' stock; perfumers' stock; pitch; plumbing and purtering; pocket-book making; printing of newspapers and engravings; rag and junk-shop stock; rosin; ship chandlery; spirits of turpentine; tar; tin, or sheet iron, or copper working; turning of wood; turpentine; umbrella making; upholstery manufacturing; varnish, and wooden ware sellers' stock.

The following are considered extra hazardous, on account of their great liability to damage, and are charged 20 cents per $100, in addition to, but do not increase the rate of the building. They are: artificial flowers; book sellers' stock; cabinet ware; china, earthen, or glass ware, unpacked; confectioners' stock; daguerreotypists'
stock; furs, unpacked; jewelers' stock; lamp sellers' stock;
78 liquor in glass, unpacked; milliners' stock; musical instruments and printed music; needles; optical and mathematical instrument makers' stock; pictures and prints; precious stones; pocket-book makers' stock; silversmiths' stock; silver and plated ware; straw goods; stationers' stock; toy-shop keepers' stock; watch-makers' stock and tools; window or plate glass, unpacked; and wine in glasses, unpacked.

Memorandum of special hazards.—Acids, (nitric, muriatic and other acids causing ignition;) bakeries; bark mills; bleaching works; blind makers' shops; carpenters' shops; candle manufactories; camphene on sale; coppersmiths' shops, with forges; coffee and spice mills; chemical labratories; coach makkers' shops; comb manufactories; confectionary manufactories; corn kilns; cotton mills; cotton presses; cotton, unpacked; distilling and rectify-

ing establishments; dyeing establishments; druggists' stock, (wholesale;) drug and spice mills; ether; fur dressing establishments; fire works; fire work manufactories; flax mills; flour; cloth manufactories; fringe manufactories; folding mills; flax, unpacked; gas manufactories; grate manufactories; grist or flouring mills; gun manufactories; gunpowder; hat manufactories; hay; building or repairing; hemp, unpacked; India rubber or gutta percha manufactories; ink manfactories; iron foundries; ivory, black, and lamp black manufactories; lime yards and sheds; livery stables; lumber yards; looking glass and picture-frame manufactories; machine shops; mahogany yards, malt houses; matches, manufactories; metal mills; musical instrument manufactories; oil boiling houses; oil cloth manufactories; oil clothing manufactures; oil mills and manufactories; omnibus stables; plating; plated ware manufactories; packing buildings and yards; paper mills; paper hanging manufactories; percussion cap manufactories; perfuming manufactories; planing, or grooving, or moulding mills; powder mills; printing of books and job printing; phosphorous, rope, and cordage manufactories; safe (iron) manufactories; stove manufactories; saltpetre; sash makers' shops; saw mills; soap manufactories; silversmiths' manufactories; snuff mills; spirit gas manufactories, and spirit gas on sale; stables; stave yards; steam boats; steam engines, in use; sugar refiners; tobacco manufactories; type and stereotype foundries; tallow melting establishments;
79 tanneries; tar boiling houses; theatres, and other places of public exhibitions; timber yards; turpentine distilleries; varnish manufactories; wool mills; wheelright shops, and generally all mills and manufacturing establishments, and all trades and occupations requiring the use of fire heat, not before enumerated. Camphene, spirit gas, or burning fluid, when used in stores, ware-houses, shops, or manufactories as a light, subject the goods therein to an additional charge, and permission for such use must be endorsed in writing on the policy. Gunpowder, phosphorous, and saltpetre are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent, in writing, in the policy. Fences and privies, also store furniture and fixtures, must be separately and specifically insured.

Conditions of insurance.

Applications for insurance on property must be in writing, and must specify the construction and materials of the buildings to be insured, or containing the property to be insured: by whom occupied; whether as a private dwelling or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether any manufacturing is carried on within or about it, and in relation to the insurance of goods and merchandise; whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special hazards. If any person insuring any building or goods in this office, shall make any misrepresentation or concealment; or if, after insurance is effected,

either by the original policy or by the renewal thereof, the risk be increased by any means whatever within the control of the assured; or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at time of insuring, such insurance shall be void and of no effect.

If during the insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise; or if, for any other cause, the company shall so
80 elect, it shall be optional with the company to terminate the insurance, after notice given to the assured or his representative of their intention to do so; in which case the company will refund a ratable proportion of the premium.

II. No insurance, whether original or continued, shall be considered as binding, until the actual payment of the premium.

III. Property held in trust or on commission must be insured as such; otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest on property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void.

[NOTE.—By "property held in trust" is intended property held under a deed of trust, or under the appointment of a court of law, or property held as collateral security; in which latter case this company shall be liable only to the extent of the interest of the assured in such property.]

IV. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement made thereon. In case of assignment, without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease, and the company reserve to itself the right to elect either to consent to the transfer or return a ratable proportion of the premium and cancel the policy. In case of claim for loss or damage on a policy assigned, when there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured, in conformity with the conditions of this policy, in like manner as if no assignment hand been made; otherwise this policy shall be void. and of no force or effect whatever, and all liability on the part of this company shall cease.

V. Notice of all previous insurance upon property insured by this company shall be given to them, and endorsed on this policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon; otherwise the policy sub-
81 scribed by this company shall be of no effect. And in case of subsequent insurance on property insured by this company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be endorsed on

the policy subscribed by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of insurance this company shall be liable only for such ratable proportion of the loss or damage happening to the subject insured as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies.

VI. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property; and if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect; and it is mutually understood that there can be no abandonment to the insurers of the subject insured. This company will not be liable for loss or damage caused by lightning, except that which results from fires that may ensue therefrom; nor for any loss, either by fire or otherwise, occasioned by the explosion of a steam boiler, or occasioned by camphene, or by the explosion of gunpowder, or any other explosive substance.

VII. Books of account, written securities, or evidence of debt, title deeds, writings, and money or bullion, are not deemed objects of insurance.

VIII. Jewels, jewelry, precious stones, watches, plate, medals, musical instruments, piano-fortes in dwelling houses excepted; printed music; scientific instruments; paintings; prints; engravings, statuary, sculptures, curiosities, casts and models, are not included in any insurance, unless particularly specified in the policy.

IX. Persons sustaining loss or damage by fire are forthwith to give notice thereof, in writing, to the company, or its agent; and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed
82 with their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurance has been made on the same property; giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe. They shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (most contiguous to the place of the fire, and not concerned in the loss as acreditor or otherwise, or related to the insured or sufferers,) stating that he has examined the circumstances attending the fire, loss or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and

damage in the subject insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify.

When merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon, one-half of the appraiser's fee to be paid by the insurers, and shall, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the
83 same being reduced to writing; and whenever required in writing, the insured, or person claiming, shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall, also, exhibit to any persons named by the company, and shall permit to be examined by them any property damaged on which any loss is claimed, or any property saved which was insured by this policy. And until such proofs, declarations, and certificates are produced, and such appraisals and examination of property permitted by the claimant, the loss shall not be payable. All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers in this policy.

X. In case of any loss on, or damage to, the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and quality, and to rebuild or to repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after having received the preliminary proofs of loss required by the ninth article of these conditions. In case differences shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing, as to the amount of such loss and damage, shall be binding on the parties. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved.

XI. Insurance once made, may be continued for such further time as may be agreed upon, the premium required therefor being paid, and endorsed on the policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make where the risk has been
84 changed either within itself, or by the surrounding or adjacent buildings; and if at or before the time of renewing any

policy of insurance on property where the risk has been increased by the erection of buildings, or by the use or occupation of the premises insured, or of the neighboring premises, the assured shall fail to give information thereof, said policy and renewal shall be void and of no effect.

XII. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy, and warranty on the part of the insured.

XIII. Where property, insured by this company, is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be born by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

XIV. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fire in places where laws and regulations on this subject exist.

XV. It is furthermore hereby expressly provided that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage snall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

Directors: Simeon L. Loomis, president; Chester Adams, N. H. Morgan, Erastus Smith, Dan'l R. Crosby, Marshall Jewell, Chas. M. Beach, John A. Butler, N. M. Waterman, J. W. Seymour,
85 Jos. Merriman, Wm. D. Shipman, Lyman Stockbridge, Elisha T. Smith, Geo. W. Moore, Dan. H. Arnold, N. York, Ezra White, New York; Henry Kellogg, secretary.

Endorsed: This policy expires Oct. 10, 1858. No. 2. Phœnix Insurance Company, Hartford, Conn. Medbery & Aldrich, for use of Isaac N. Swain, $1,500; premium, $60 00; policy, $50; survey, $60 50.

[SEAL.]

Exhibit C.

Phœnix Insurance Company of Hartford, Conn.

No. 2. $1,500.

In consideration of sixty dollars, do issue Medbery & Aldrich, for the use of Isaac N. Swain, of Palmer, Mass., against loss or damage by fire, to the amount of fifteen hundred dollars, on their saw mills

situated in the town of Watervliet, in the county of Berrien and State of Michigan, and more particularly described in application No. 2, on file in this office, and the diagram thereon.

Notice of the following insurance given this company, viz:

$3,000 in the Washington Union Co., Cleveland, Ohio; $1,500 in the Ætna Ins. Co., Hartford; for 1 year from the 10th day of Oct., 1857, to the 10th day of Oct., 1858. Amount insured, $1,500; rate, 47; amount of premium, $60 00.

(Si'g'd) R. C. PAINE, *Agent.*

Survey of premises.

1. Building.—Is it stone, brick, or wood? How many stories high?

1. Wood. One rebuilt, in 1850, of wood, 26 by 110 ft.; 2 stories high; the other built, in 1855, of wood; size, about 60 by 60 feet; 2 stories high.

2. Where situated? Street and No.; when built; which part occupied by the applicant?

3. Walls.—Are the division walls of brick? Are they entire? Do they rise above the roof?

3.

4. Roof.—What is it covered with? Is there a scuttle and stairs to it?

4. Shingles. No scuttle, but easy of access to roof.

5. Has it a lightning rod? If so, how high does it rise above the roof? Does it descend into the ground three feet?

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5.

6. What fuel is used; and how are ashes disposed of?

6. Wood. Ashes safely disposed of.

7. Are the stoves and pipes properly secured, and will you engage to keep them so?

7. There are places for 5 stoves; brick hearth and zinc under them.

8. Do the pipes enter a chimney, and is it built from the ground? Do pipes pass through wood partition, or floors? If so, how secured?

8. Pipe enters chimneys; chimneys from ground.

9. What material is used for light?

9. Oil and candles.

10. For what purpose is the building used? How many tenants?

10. Sawing lumber.

11. Distance and material of other buildings within 100 feet of the one to be insured, and how occupied?

11. None within one hundred feet.

12. What other insurance is there upon the property, and at what office?

12. $3,000 in the Washington Union Ins. Co., and $1,500 in the Ætna Ins. Co. of Hartford.

13. Is the property mortgaged; and to what amount? Is there any insurance by the mortgage?

13. About $33,000 on this and other property, mills, &c., and on 1000 acres of land by mortgage to said Isaac N. Swain, for whose benefit this insurance is taken.

14. Is there any other party interested in the property?

14. No.

15. Have you ever suffered loss of property by fire? If so, were you insured, and in what office?

15. No loss by fire.

16. What are the facilities for extinguishing fires, and is there a good engine and well-organized fire company in the town?

16. No engine in the place; good facilities for extinguishing fires with buckets.

And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition,
87 situation, and value of the property to be insured, so far as the same are known to the applicant and material to the risk.

Dated Niles, Oct. 10, 1857.

(Sig'd) MEDBERY & ALDRICH,

By and for use, benefit, and security of Isaac N. Swain, ~~deceased~~ applicants

[Here follows map marked page 87.]

JUNE 6, 1864.

This day came the complainants, by N. C. Gridley, esq., their solicitor, and filed their replication as follows, to wit:

Circuit court of the United States, 9th circuit and district of Wisconsin.

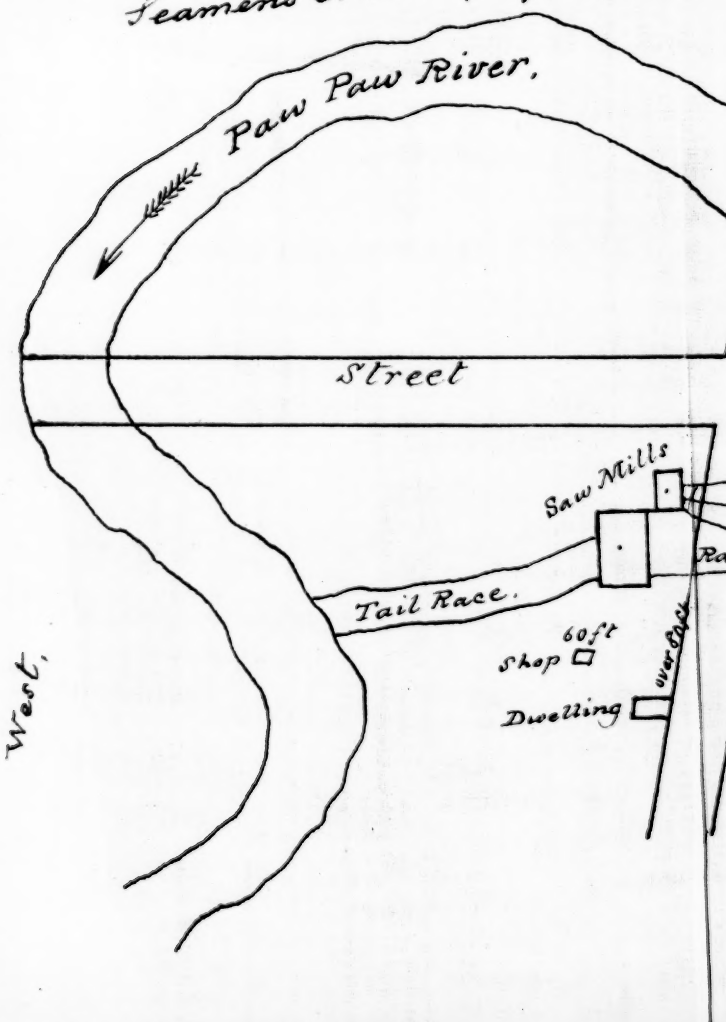
STEPHEN H. SEAMENS, CATHARINE M. STEPHENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

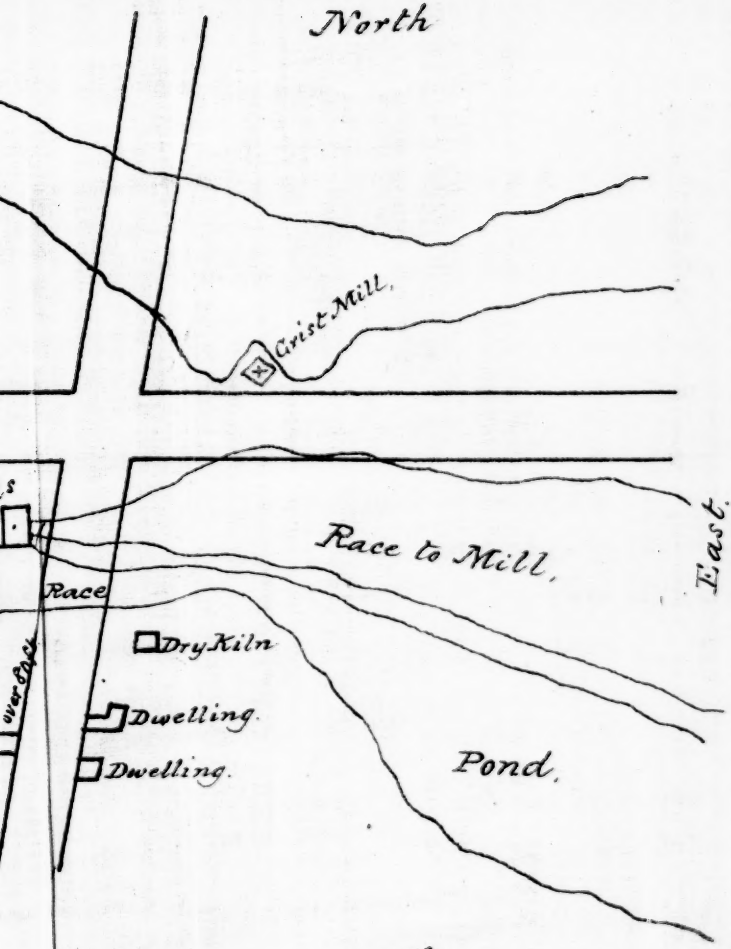
The replication of Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling, complainants, to the answer of Isaac N. Swain, defendant.

88 These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things these repliants are, and will be ready to aver & prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

N. C. GRIDLEY,
Compl'ts Sol'r.

No. 257. - Swain,
vs
Seamens et al. - page 87.




North
Grist Mill.
Race to Mill.
East.
Race
Dry Kiln
Dwelling.
Dwelling.
Pond.
South.

JUNE 9, 1864.

This day came the complainants, by their solicitor, Mr. Gridley, and entered in the order and rule book, a rule for a commission to issue to Henry Martin, esq., of Providence, in the State of Rhode Island, commissioner named on the part of the complainants, to take the testimony of James F. Aldrich, a witness to be produced, sworn, & examined by & before commissioner, on interrogatories this day filed with the clerk of this court, to be read in evidence on the part and behalf of the complainants on the hearing of this cause. And at the same time filed a copy of said order, with interrogatories attached, upon which was endorsed the following words, to wit: "We admit service of a copy of the within, this 9th day of June, 1864. Finches, Lynde & Miller, sols. for def't."

JUNE 16, 1864.

This day came the complainants, by their solicitor, Mr. Gridley, and entered in the rule and order book a rule that a commission issue out of, and under the seal of this court, to be directed to J. N. hipman, esq., of Niles, State of Michigan, commissioner named on the part of the complainants, to take the testimony of R. C. Paine, a witness to be produced, sworn, and examined by and before said commissioner on interrogatories this day filed with the clerk of
89 this court, to be read in evidence on the part and behalf of the complainants on the hearing of this cause, and at the same time filed a copy of said order, with interrogatories attached, upon which was endorsed the following words, to wit: "We admit service of a copy of the within, this 16th day of June, 1864. Finches, Lynde & Miller, sols. for deft."

JUNE 30, 1864.

Cross-interrogatories and objections filed by defendant to both setts of interrogatories heretofore filed by complainants.

JULY 1, 1864.

This day came the complainants, by their solicitor, Mr. Gridley, and entered in the order and rule book, a rule that a commission issue out of, and under the seal of this court, to be directed to Samuel Dale, jr., of the city of Chicago, State of Illinois, commissioner named on the part of the complainants, to take the testimony of William Aldrich, a witness to be produced, sworn, and examined by and before said commisioner on interrogatories this day filed with the clerk of this court, to be read in evidence on the part and behalf of the complainants on the hearing of this cause. And upon the interrogatories and copy of rule filed were endorsed as follows, to wit: "We do hereby admit due service of a copy of the within, this 1st day of July, 1864. Finches, Lynde & Miller, sols. for deft."

And on the same day a commission was issued to J. N. Chipman, esq., of Niles, Michigan, and to Henry Martin, esq., of Providence, Rhode Island.

JULY 8, 1864.

This day came the complainants, by N. C. Gridley, esq., their solicitor, and entered in the order and rule book a rule, that a commission issue out of, and under the seal of this court, to be directed to Edward C. Reed, esq., of Homer, county of Courtland, State of New York, commissioner named on the part of the complainants, to take the testimony of Jonathan S. Stewart, a witness to be produced, sworn, & examined by, & before said commissioner, on interrogatories this day filed with the clerk of this court, to be read in evidence on the part and behalf of the complainants on the hearing of this cause. And upon the interrogatories and rule filed were endorsed as follows, to wit: "We do hereby admit service of copies of the within, this 8th day of July, 1864. Finches, Lynde & Miller, defendant's solicitors."

And afterwards, on the 19th day of July, 1864, the defendant filed his objections to the interrogatories to be propounded to said witness Stewart, and also filed cross-interrogatories; and on the same
90 day commission issued to the said Edward C. Reed, esq., and Samuel Dale, jr., esq.

And afterwards, on the same day, came the complainants, by N. C. Gridley, esq., their solicitor, and entered in the order and rule book a rule, that a commission issue out of, and under the seal of this court, to be directed to Henry W. Watson, esq., of Williamsport, Lycoming county, State of Pennsylvania, commissioner named on the part of the complainants, to take the testimony of Henry A. Miller, a witness to be produced, sworn, and examined by, and before said commissioner, on interrogatories this day filed with the clerk of this court, to be read in evidence on the part and behalf of the complainants on the hearing of this cause. And upon said interrogatories and copy of the rule filed, is endorsed as follows: "We do hereby admit servive of a copy of the wichin this 19th day of July, A. D. 1864. Finches, Lynde & Miller, solicitor for deft."

Cross-interrogatories filed July 23, 1864.

JULY 30, 1864.

Commission issued to Henry W. Watson.

AUGUST 1, 1864.

Deposition of James F. Aldrich received from the post office and filed.

AUGUST 4, 1864.

Depositions received from the post-office and filed.

AUGUST 10, 1864.

Depositions received from the post-office and filed.

AUGUST 13, 1864.

Deposition of Wm. Aldrich received from S. Dale, jr., and filed.

AUGUST 27, 1864.

Depositions received from the post-office and filed.

SEPTEMBER 12, 1864.

This day came the parties, by their counsel, and by consent, it is ordered by the court that the time for taking testimony in this cause be, and the same is hereby extended to the first Monday of December next, and it is further ordered that all depositions on file be, and the same are published.

SEPTEMBER 14, 1864.

Deposition of Henry A. Miller received from the post-office and filed.

OCTOBER 6, 1864.

This day came the complainats, by their solicitor, and entered in the order and rule book, a rule, that a commission issue out of, and under the seal of this court, to be directed to J. H. Skidmore, esq., Little Rock, State of Arkansas, commissioner named on the part of the complainants, to take the testimony of John W. Medburry, a witness on the part of the complainants, and also filed interrogatories to be attached to said commission.

OCTOBER 17, 1864.

Cross-interrogatories filed by defendant and commission issued.

NOVEMBER 16, 1864.

Deposition of J. W. Medbury received from the post-office and filed.

91 NOVEMBER 30, 1864.

Deposition of J. W. Medbery published in the clerk's office by written stipulation of the parties on file.

APRIL 13, 1865.

This day came the parties, by their counsel, and by consent, it is ordered, by the court, that the time for taking testimony in this cause be, and the same is extended to the first Monday of July next.

APRIL 21, 1865.

This day came the defendant, by his counsel, and entered in the order and rule book his rule for a commission to issue to Nathaniel McDonald, esq., of the city of St. Louis, in the State of Missouri, to take the testimony of Clinton B. Fisk, and filed interrogatories to be annexed to said commission.

APRIL 27, 1865.

This day came the complainants, by their counsel, and filed cross-interrogatories to be attached to said commission.

APRIL 28, 1865.

Commission issued.

MAY 9, 1865.

Depositions received from post-office and filed.

MAY 15, 1865.

This day came the defendant, and entered his rule that a commission issue to Addison Mandell, esq., of Detroit, and also to John Whitehead, esq., of New Ark, N. J., to take the testimony of certain witnesses therein named, and also filed interrogatories to be attached to said commission.

MAY 22, 1865.

This day came the complainants and filed cross-interrogatories to the propounded to be witness, Galen M. Fisher.

MAY 23, 1865.

Commission issued to John Whitehead, esq.

JUNE 2, 1865

This day came the complainants, by their solicitor, and filed cross-interrogatories to be propounded to Philo Parsons and Isaac N. Swain, and the defendant filed his objections.

JUNE 3, 1865.

Commission issued to Addison Mandell, esq., of Detroit.

JUNE 19, 1865.

Deposition of Galen M. Fisher received from post-office and filed.

JULY 3, 1865.

Deposition, de bene esse, of Warren M. Baldwin received from the post-office and filed.

JULY 5, 1865.

This day came the parties and filed stipulations extending the time to take testimony to the 10th day of August, 1865.

JULY 17, 1865.

This day came N. C. Gridley, of counsel for the complainants, and on his motion it is ordered, by the court, that the depositions on file in this cause be and the same are published.

AUGUST 7, 1865.

Deposition received from the post-office and filed.

92 AUGUST 14, 1865.

This day came the complainants, by their counsel, and filed notice to defendant to produce papers as follows:

Circuit court of the United States for the 9th circuit & district of Wisconsin.

STEPHEN H. SEAMENS, CATHARINE M. Stephens & Edward P. Whaling,
vs.
ISAAC N. SWAIN.

Take notice that you are hereby required and notified to produce, upon the hearing of this case, three certain policies of insurance obtained by, & in the name of "Medbery & Aldrich," to wit, in the Ætna Insurance Company, No. 371; in the Washington Union Insurance Company, of Cleveland, Ohio, & in the Jackson Mutual Insurance Company, of Jackson, Michigan, referred to in the bill filed in this cause, and in the 7th special interrogatory; and also two certain other policies of insurance, in the Ætna Insurance Company, policy No. 441, and in the Washington Union Insurance Company, alleged to have been obtained by the said defendant, in the name of Medbery & Aldrich, on or about the 12th day of October, 1857, and particularly referred to in the said bill, and in the 8th special interrogatory thereof; and, also, three more certain other policies of insurance, in the Market, Irving, Resolute, & other insurance companies of the city of New York, alleged to have been obtained by the said defendant, in the name of "Medbery & Aldrich," on or about the 27th day of September, 1858, and particularly referred to in said bill, and in the 9th special interrogatory thereof, or that secondary evidence will be given of their contents.

Dated June, 1864.

N. C. GRIDLEY,
Compl'ts Sol'r.

To Finches, Lynde & Miller, def't's solr's.

Endorsed: "We do hereby admit service of a copy of the within notice, this 6th day of June, A. D. 1864. Finches, Lynde & Miller, att'ys for deft."

And on the same day filed stipulation as to the admission of testimony.

93 AUGUST 17, 1865.

Depositions published in clerk's office by stipulation of the parties.

SEPTEMBER 11, 1865.

This day came the complainants, by their solicitor, and filed their motion to suppress depositions. And same day came the defendant, by his solicitors, and filed motion to suppress depositions.

SEPTEMBER 14, 1865.

This day came the complainants, by their counsel, and filed their motion to amend the bill of complaint, with admission of service endorsed thereon, as follows:

U. S. circuit court, district of Wisconsin, in equity.

STEPHEN H. SEAMENS, *et al*,
vs.
ISAAC N. SWAIN.

Take notice that on the 18th day of September, A. D. 1865, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion will be made on behalf of the complainants for leave to amend the bill of complaint on file in this cause, by inserting on the 5th page of said bill, and after the words "will more fully and at large appear," as follows, to wit:

And your orators further show unto honors, that the aforesaid, executed by the said John W. Medbury & wife t defendant, and the agreement attached thereto executed t defendant, were executed and delivered under & in purs certain contract for the sale of the lands in the State of Michigan aforesaid, theretofore made and entered into by & between the said defendant and the said John W. Medbery & James F. Aldrich, bearing date the 28th day of September, A. D. 1854, and with the intent and purpose only, as recited in said contract, as good and satisfactory and as additional security upon other property. for the amount of six thousand six hundred and sixty-six & $\frac{2}{3}$ dollars, ($6,666\frac{2}{3}$) and being a part and portion of the same sum and amount of money, secured to be paid by the said Medbury & Aldrich to the said defendant, by their mortgage executed and delivered to the said defendant, upon the lands purchased by them of the said defendant in the State of Michigan aforesaid.

94

N. C. GRIDLEY,
Compl'ts Sol'r.

To Finches, Lynde & Miller, defts. solrs.

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Endorsed: "Service of copy admitted, this 14th day of Septms. 1865. Finches, Lynde and Miller, pr Mac."

SEPTEMBER 30, 1865.

Depositions received from post-office, and filed.

OCTOBER 4, 1865.

This day, ordered by the court, that the depositions on file in this cause be, and the same are published.

SEPTEMBER 3, 1866.

Rule entered by defendant, setting this cause down for hearing at September term, 1866.

OCTOBER 8, 1866.

This day, came the parties, by their counsel, and submitted this cause by the consideration of the court.

MARCH 5, 1867.

This cause, having been submitted by counsel upon the pleadings and proofs, it is ordered, adjudged and decreed by the court, that a mortgage, made and executed by John W. Medbery, and Mary R. Medbery, his wife, to the defendant, Isaac N. Swain, bearing date, the fourteenth day of April, one thousand eight hundred and fifty-five, and recorded in the office of the register of deeds of the county of Milwaukee, State of Wisconsin, in volume 30 of mortgages, on page 12, &c., be by the said defendant, Isaac N. Swain, cancelled and discharged of record within thirty days, and that the said defendant, Isaac N. Swain, pay the costs of this suit, and proceedings to be taxed.

MARCH 16, 1867.

This day came the defendant, by his counsel, and filed his petition for an appeal, with the allowance of the district judge, endorsed thereon, in the words and figures following, to wit:

95 Circuit court of the United States, in and for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHARINE M. Stevens & EDWARD P. Whaling.
vs.
ISAAC N. SWAIN. } In equity.

And now comes the said defendant, Isaac N. Swain, and prays that an appeal may be allowed to the Supreme Court of the United States, from the decree rendered in the above entitled cause.

Dated March 15, 1867.

FINCHES, LYNDE & MILLER.
Def'ts Att'ys.

Endorsed: "March 16, 1867, appeal allowed. A. G. Miller, district judge."

And on the same day came the defendant, by his counsel, and filed an appeal bond, with the approval of the district judge, endorsed thereon, as follows, to wit:

Know all men by these presents, that we, Asahel Finch, William P. Lynde, Benjamin K. Miller, and Henry M. Finch of the city of Milwaukee, and State of Wisconsin, are held and firmly bound unto Stephen H. Seamens, Catharine M. Stevens and Edward P. Whaling, complainants in a cause in equity, hereinafter mentioned, in the full and just sum of one thousand dollars, lawful money of the United

States, to be paid to the said Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling, or their certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fifteenth day of March, A. D. 1867.

96 Whereas, lately, at a term of the circuit court of the United States, in and for the district of Wisconsin, *in and for the district of Wisconsin*, in a suit in equity, wherein Stephen H. Seamens, Catharine M. Stephens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, a decree was rendered against the said defendant, Isaac N. Swain, and the said defendant, Isaac N. Swain, having obtained an appeal from the said decree, to the Supreme Court of the United States, and filed a copy of the record of said suit, in the clerk's office in the Supreme Court of the United States, to remove the said decree, in the aforesaid suit, and a citation in due form, directed to the said Stephen H. Seamens, Catharine M. Stephens and Edward P. Whaling, admonishing them to appear, and be at a term of the Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of this obligation is such, that if the said Isaac N. Swain shall prosecute his said appeal to effect, and answer all damages and costs, if said defendant, Isaac N. Swain, fails to make his said appeal good, then the above obligation to be void, else to remain in full force and virtue.

ASAHEL FINCH. [SEAL.]
WM. P. LYNDE. [SEAL.]
B. K. MILLER. [SEAL.]
H. M. FINCH. [SEAL.]

Sealed and delivered in presence of—

DISTRICT OF WISCONSIN, *ss:*

Asahel Finch, William P. Lynde, Benjamin K. Miller, and Henry M. Finch being duly sworn, each for himself, says, that he is a freeholder in, and resident of the State of Wisconsin, and is worth the sum of two thousand dollars over and above all debts and exemptions.

ASAHEL FINCH.
WM. P. LYNDE.
B. K. MILLER.
H. M. FINCH.

Subscribed and sworn to, before me, this 15th day of March, A. D. 1867.

JAMES MAC ALISTER,
Notary Public, Milwaukee Co. Wis.

Endorsed: "March 16, 1867, bond approved. A. G. Miller, district judge."

97 *Complainants' Testimony.*

The complainants, to maintain the issue on their part, offered and read in evidence a stipulation, as follows, to wit:

Circuit court of the United States, for the 9th circuit and district of Wisconsin, in equity.

STEPHEN H. SEAMENS, CATHARINE M. Stephens & Edward P. Whaling,
vs.
ISAAC N. SWAIN.

It is hereby stipulated and agreed, that the annexed and foregoing order of discharge in insolvency, in the matter of the application of John W. Medbery, an insolvent debtor, to be discharged from his debts, may be read in evidence by the complainants on the hearing of this cause, as evidence of the facts, therein contained and recited, without the production of the whole record in said insolvent proceedings, and subject to all objections, as to the relevancy of said evidence.

Dated October 10th, 1864.

FINCHES, LYNDE & MILLER,
Def'ts Att'ys.

The complainants further, to maintain the issue on their part, offered and read in evidence under said stipulation, a copy of an order, as follows, to wit:

Circuit court, Milwaukee county.

In the matter of the application of John W. Medbery, an insolvent debtor, to be discharged from his debts.

By order of the Hon. Arthur McArthur, judge of the circuit court of said county.

To all to whom these presence shall come, greeting:

The above named, John W. Medbery, having presented a petition to me, with proper schedule annexed, duly verified by his oath, praying for an assignment of his property for the benefit of
98 all his creditors, and for a discharge from his debts, pursuant to the act for the relief of insolvent debtors; and I having appointed a day, in said county of Milwaukee, for all the creditors of said Medbery to appear before me, and show cause, if any they had, why an assignment of the said insolvent's estate should not be made, and he, the said insolvent, be discharged from his debts, according to the provisions of said act:

And, whereas, it appears to me, that the said insolvent has conformed in all respects, to the true intent and meaning of the said act, and the said insolvent, John W. Medbery, has, on the 22d day of October, 1863, executed an assignment of all his estate to Wm. G.

Whipple and Galen B. Seamen of the city of Milwaukee, & State of Wisconsin, assignees appointed, according to said act; and has produced and proved before me, a certificate of said assignees, and of F. Baggeler, register of deeds of Milwaukee county, of the execution and recording of said assignment, and of the delivery of the property assigned, with the books, vouchers, and securities relating to the same:

Now, therefore, on motion of Pitkin & Davis, I do, by virtue of the said act, for the relief of insolvent debtors, declare that the said insolvent debtor, forever, hereafter, be discharged from all the debts by him owing at the time of his said assignment, pursuant to the said act, according to the true intent & meaning thereof.

In witness, whereof, I have hereunto, set my hand and seal of this court, this 26th day of October, 1863.

[SEAL.] ARTHUR McARTHUR,
Circuit Judge.

STATE OF WISCONSIN, *Circuit Court, Milwaukee County, ss:*

I, D. McDonald, clerk of said court, do hereby certify, that I have compared the foregoing copy with the original discharge entered in the matter therein entitled, that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony, whereof, I have hereunto, set my hand, and
99 affixed the seal of said court, this 7th day of October, A. D. 1864.

[SEAL.] D. McDONALD, *Clerk.*
By W. L. CLEAVER, *Deputy.*

[5 cent revenue stamp, cancelled.]

The complainants further, to maintain the issue on their part, offered and read in evidence a certain other stipulation, as follows, to wit:

Circuit court of the United States, for the 9th circuit and district of Wisconsin.

STEPHEN A. SEAMANS, CATHARINE M. Stephens & Edward P. Whaling,
vs.
ISAAC N. SWAIN.

It is hereby stipulated and agreed:

1st. That at the time of filing of the bill in this cause, the said complainants were the owners in fee of lots nine, (9,) ten, (10,) & the south five feet, extending the same width from front to rear of lot eight, (8,) in block thirty-two, (32,) and the flouring mill, situate thereon, known as the Empire mill, situate and being in the 2d ward of the city of Milwaukee, State of Wisconsin.

2d. That since the filing of the bill in this cause, the said Edward P. Whaling conveyed, by full covenant, warranty deed, all his right,

title and interest in & to the lands above described, unto the said Stephen H. Seamans.

3d. That since the filing of the bill in this cause, & subsequent to the conveyance by the said Whaling, the said Stephen H. Seamans conveyed, by full covenant, warranty deeds unto Martin B. Medbery, nine-sixteenths of the property above described, and unto Catharine M. Stephens, thre-sixteenths thereof, and that at the date hereof, the said Martin B. Medbery and Catharine M. Stevens are the owners in fee of the said above described property.

100 4th. That this stipulation may be read by either party, on the hearing of this cause, as evidence of the facts herein contained, subject to the objections of the revelancy of the testimony.

Dated October 7th, 1864.

N. C. GRIDLEY,
Comp'l to Sol'r.
FINCHES, LYNDE & MILLER,
Sol's for Def't.

The complainants, to further maintain the issue on their part, offered and read in evidence, the deposition of R. C. Paine, as follows, to wit:

101 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States of America to J. N. Chipman, esq., greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine R. C. Paine on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Cartharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part of the complainants upon the interrogatories annexed to this commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said R. C. Paine to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, or the seals of any one or more of you, into the said circuit court of the United States before the judge thereof, with all convenient speed.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee in said district, this first day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

102 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file, and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee in the said district of Wisconsin, this first day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States, the eighty-eighth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

103 Interrogatories to be ~~administered~~ to R. C. Paine, of Niles, in the State of Michigan, to be produced, sworn, and examined before J. N. Chipman, esq., residing at Niles, State of Michigan in a certain cause now pending and at issue in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part and behalf of the said complainants.

First interrogatory. What is your name and occupation, and where do you now reside?

Second interrogatory. Do you know the parties, complainants and defendant, in the title to these interrogatories named, or either, and which of them, and how long have you known them, or either, and which of them?

Third interrogatory. State whether or not you are an agent of the Ætna Insurance Company of Hartford, Connecticut; if yea, how long have you been such agent, and at what place?

Fourth interrogatory. Who was the agent of the Ætna Insurance Company of Hartford, Connecticut, at Niles, State of Michigan, prior to, and on or about the 30th day of May, 1856? What has become of such agent? Are you familiar and acquainted with the handwriting of such agent? Have you seen him write?

Fifth interrogatory. State whether or not you have in your possession or under your control the books of the agency of the Ætna Insurance Company at Niles, Michigan, for and during the year 1856; if yea, will you refer thereto, and state in whose handwriting are such books, and whether or not there was a policy of insurance issued to Medbery and Aldrich on or about the 30th day of May, 1856; if yea, when, on what day, upon what property, and where situate, in what amount or amounts, and what amount or amounts upon each
104 description of property, what was the amount of premium paid, and what the number or numbers of such policy or policies of insurance? Was notice given of other insurance having been obtained; if yea, in what companies, for what amount, and upon what property? You will please make a true copy from the books of said

Ætna Company, and attach to this your deposition, the minutes or memoranda of such insurance and notice.

Sixth interrogatory. State whether or not you was the agent of the Ætna and Phœnix Insurance Companies of Hartford, Connecticut, at Niles, Michigan, on or about the 10th day of October, 1857; if yea, state whether or not any policy or policies of insurance were issued by you as the agent of said companies, on or about the 10th day of October, 1857, in the name of Medbery and Aldrich; if yea, when, on what day, in what companies, upon what property, and where situate, in what amount or amounts, and what amount or amounts upon each description of property, what was the amount or amounts of premium paid, and what was the number or numbers of such policy or policies of insurance? For whose benefit was such policy or policies issued, and to whom delivered? Was notice given of other insurance having been obtained; if yea, by whom, in what companies, for what amount or amounts, and upon what property, and where situate?

You will please make a true copy from the books of said agency of said Ætna and Hartford Insurance Companies, the minutes or memoranda of such insurance and notice, and attach to your deposition.

Seventh interrogatory. Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY, *Compt'ls' Sol'r.*

105 Circuit court of the United States, in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.

And now comes the said defendant, by Finches, Lynde, & Miller, his solicitors, and objects to the interrogatories addressed to R. C. Paine, numbered fifth and sixth, for the reason that said interrogatories, and each of them, call for testimony that is irrelevant, incompetent, and immaterial, and for testimony which is hearsay. And said defendant, not waiving his said exceptions, joins in said commission to be issued to J. N. Chipman, of Niles, Michigan, take the deposition of the witness R. C. Paine, and propounds to said witness the following cross interrogatories:

First cross-interrogatory. Have you in your possession the original papers relating to the policies of insurance or the obtaining of the policies of insurance mentioned in the fifth and sixth direct interrogatories? If yea, will you produce said original papers, and all of them, or true copies thereof?

Second cross-interrogatory. If you have not in your possession the

original papers upon which the said insurance policies were issued, please state where the same are, or where they probably are?

Third cross-interrogatory. Are not applications for insurance made in writing, giving a description of the property, and generally in case of a mill property accompanied with a diagram of the property, showing its situation, locality, &c., &c. If yea, do you know whether the application for insurance, or to obtain the insurance policies mentioned in the said fifth and sixth interrogatories was in writing, and accompanied with a diagram of the property, its situation, locality, &c., &c.?

Fourth cross-interrogatory. Are not said original papers
106 usually forwarded to the home office, or to the general agency of the company? Was it so done in this case?

Fifth cross-interrogatory. If you answer the sixth direct interrogatory by saying that notice was given by any party of a prior insurance upon the property, please state whether you suggested or intimated to the party the fact that there was a prior insurance, and that the same was inserted upon the faith and strength of your suggestion.

Sixth cross-interrogatory. Who examined the property insured by the said policies for the purpose of arriving at the condition and locality of the property? Who filled up the application for the insurance? Was a diagram made of the property, and who made it, and where is it?

FINCHES, LYNDE & MILLER,
Solicitors for Defendant.

Deposition of Rodney C. Paine, taken on the 22d day of August, A. D. 1864, at the city of Niles, in the county of Berrien and State of Michigan, in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen C. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part and behalf of said complainants, in pursuance of the commission, interrogatories and cross-interrogatories hereto attached, drawn by the solicitors of the respective parties to said suit.

Answer to first interrogatory. My name is Rodney C. Paine; my occupation is that of a private banker, exchange broker, and insurance agent, and I reside in the city of Niles, county of Berrien, and State of Michigan.

Answer to second interrogatory. I know Isaac N. Swain, defendant, and have known him for fifteen years past. I do not know the complainants.

Answer to third interrogatory. I am agent of the Ætna
107 Fire Insurance Company of Hartford, Connecticut, and have been such agent at Niles, Berrien county and State of Michigan, and have been such agent here ever since April, 1857.

Answer to fourth interrogatory. George W. Hoffman; he now resides at the city of Detroit, in the State of Michigan. I am familiarly acquainted with the handwriting of said Hoffman, having often seen him write.

In responding to said 5th interrogatory, I answer. I have in my possession the books of the agency of the said Ætna Insurance Company at Niles, Michigan, for the year 1856, they are in the handwriting of said George W. Hoffman, and there was, as appears from said books, a policy of insurance made to Medbery and Aldrich, on the 30th day of May, 1856, (said policy being numbered three hundred and seventy-one) for the sum of two thousand dollars, on their frame saw mill, (water-power,) situate in the village of Watervliet, Berrien county and State of Michigan, the premium paid thereon was seventy dollars, and there was also a policy of insurance issued to said Medbery and Aldrich, sd. policy No. 369, on said 30th day of May, 1856, for the sum of eight hundred dollars, on their frame building, occupied as a tavern, situate in the village of Watervliet, Berrien county, Michigan, the premium paid thereon was sixteen ($16) dollars. And there was also one other policy of insurance, No. 370, issued to sd. Medbery and Aldrich, on sd. 30th day of May, 1856, for the sum of five hundred dollars on the frame grist mill, situate in the village of Watervliet, Berrien county, Michigan, and the premium paid thereon was twelve 50-100 dollars, and this company, as appears by sd. record, had notice of $2,000 insurance on sd. property described in the sd. policy (371,) in the Washington Union Insurance Company of Cleveland, Ohio, and also of two thousand dollars on the same in the Jackson Mutual Insurance Company of Jackson, Michigan; and on said property in policy No. 369, notice of eight hundred dollars prior insurance on sd. property in the Washington Union Ins. Company of Cleveland, Ohio; and on sd. property in policy No. 370, notice of
108 five hundred dollars prior insurance on sd. property in the Washington Union Insurance Company of Cleveland, Ohio, and the further sum of $2,000 in the Jackson Mutual Insurance Company of Jackson, Mich., and each of sd. Nos. 369, 370, and 371, for one year from the sd. 30th day of May, 1856, to the 30th day of May, 1857.

In responding to said sixth interrogatory, I answer, that I was the agent of the Ætna and Phœnix Insurance Companies of Hartford, Connecticut, at Niles, Michigan, on the 10th day of October, 1857, on which date I issued policy No. 441, for premium of one hundred and seventy-five 50-100 dollars to Medbery and Aldrich, of Watervliet, Michigan, for use, benefit, and security of Isaac N. Swain, of Palmer, Mass., to the amount of five thousand five hundred dollars, viz: Fifteen hundred dollars on the saw mill, situate at Watervliet, at premium of $60. One thousand dollars on grist mill, situate at sd. Watervliet, premium $30; twenty-seven hundred dollars on the hotel and store at same place, connected and in one risk, premium $81; and three hundred dollars on wooden building used as a boarding-house at same place, premium $4 50. Said property more particularly described in application No. 411, and the diagram thereof on file in the office of this company, at Cincinnati, Ohio. This company (the Ætna) had notice of the following prior insurances on said property, to wit: $3,000 in the Washington Union Insurance Co. of Cleveland, Ohio, on sd. saw mill; $1,500 in Phœnix Ins. Co., Hartford, Con-

necticut, on sd. saw mill; $2,000 in the said Washington Union Ins. Co., on sd. grist mill; and $1,200 in the same company, on sd. hotel and store. Said policy No 411, dated Oct. 10, 1857, and expired Oct. 10, 1858, at noon.

And further, that on sd. 10th day of Oct., 1857, I issued a policy in the Phœnix Ins. Company of Hartford, Connecticut, for $1,500 for one year from said date on said saw mill in said policy No. 411 named, and for the same premium of 4 per cent., $60, but have no record of the same in my possession. The premium on said policy No. 411, was paid by said defendant Isaac N. Swain, and the policy was delivered to him by me.

In response to said 7th direct interrogatory, I answer, that
109 I think of nothing further that would be of benefit to the parties to this suit, further than that the papers hereto attached and marked A, B, C, and D, respectively are true copies of records in my possession relating to policies No. 369, 370, 371, and 411.

RODNEY C. PAINE.

Subscribed and sworn to before me, this 22d day of August, 1864.

JOSEPH N. CHIPMAN.
Commissioner.

And in answer to said first cross-interrogatory, I answer. I have such records pertaining to Nos. 369, 370, 371, and 411, as per papers hereto attached and herewith returned, marked A, B, C, and D, which are true copies of said records, but I have no records of the policy in the Phœnix company above referred to.

And in response to said second cross-interrogatory, I answer, that as to the records in case of the policy issued by the said Phœnix Co. of Hartford, Ct., I know not where they are, nor where they can probably be found.

And as to said third cross-interrogatory, I answer, that such applications are usually made in writing and accompanied with a diagram. It was so in case of No. 411, and the written application and diagram were sent to the office of the general agency at Cincinnati, Ohio.

As to said 4th cross-interrogatory and in response thereto, I answer, they are usually sent to the home office and were so sent in case of policy No. 411 aforesaid, i. e. to the office at Cincinnati, Ohio.

In response to said 5th cross-interrogatory, I answer, that any knowledge I had as agent, at the time of issuing said policy No. 411, of the fact of prior insurances, I must have had from the defendant, Isaac N. Swain, himself, but whether he imparted that knowledge to
me upon my questions to him or without any enquiries of
110 mine, I cannot say; and as to prior insurances, when the said other policies were issued, I know nothing.

In response to said 6th cross interrogatory, I answer. No one connected with said insurance company, (Ætna,) that I am aware of, examined said property at the time of issuing said policy No. 411. The application was filled up at my office in Niles by said Isaac N. Swain

or by myself at his dictation, and a diagram was made at the same time by him, and the same application and diagram were sent by me to the office at Cincinnati, Ohio, of the general Western agency of said company.

RODNEY C. PAINE.

Subscribed and sworn to before me, this 22d day of August, 1864.

JOSEPH N. CHIPMAN,
Commissioner.

STATE OF MICHIGAN, *County of Berrien, ss:*

I, Joseph N. Chipman, special commissioner appointed by the circuit court for the district of Wisconsin, and residing at the city of Niles in sd. county, do hereby certify that Rodney C. Paine, named in the annexed deposition, personally appeared before me on the 22d day of August, A. D. 1864, at one o'clock p. m. of said day, at my office in said city, and being by me the said commissioner then and there first sworn to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which said deposition was taken, was examined by me, the said commissioner, and his testimony was taken in writing; that his answers to the said several foregoing interrogatories and cross-interrogatories, were wholly written out by me and were carefully read to said Rodney C. Paine, and were then subscribed by him. And I further certify that the said deposition was taken at the request of the complainant's solicitor, to be used in a cause now pending in said circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant. And neither the complainants or defendant were present at the taking of said deposition, but both parties to said suit join in this commission, and said deposition was taken upon the direct interrogatories put by the pl'ff's solicitor above, and
111 upon cross-interrogatories aforesaid put by defendant's solicitors. And further, that the reason for taking said deposition was that said witness lives more than thirty miles from the place of trial and out of the State.

JOSEPH N. CHIPMAN,
Commissioner.

Exhibit A.

Ætna Insurance Company, No. 371.

By this policy of Insurance, the Ætna Insurance Company, in consideration of seventy dollars to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbery and Aldrich, against loss or damage by fire, to the amount of two thousand dollars on their frame saw mill, (water power,) situated in the township village of Watervliet, Berrien county, Michigan, and more fully described in survey and diagram No. 371, on file in the office of the general agency of this company at Cincinnati, Ohio, and which is hereby made a part of this policy.

$2,000 in the Washington Union Insurance Company of Cleveland.

$2,000 in the Jackson Mutual Insurance Company, Jackson, Michigan.

Dated May 30, 1856, and expired May 30, 1857, at noon.

RODNEY C. PAINE.

Endorsed: "The within is a true copy of the entries on the insurance record of the agency of the Ætna Ins. Company at this place, as appears by the record in the handwriting of Geo. W. Hoffman, agent of the company at the date thereof. Dated Niles, Michigan, May 30, 1863. R. C. Paine, agent Ætna Ins. Co."

Exhibit B.

Ætna Insurance Company, No. 411.

By this policy of insurance, the Ætna Insurance Company, in consideration of one hundred and seventy-five 50-100 dollars, to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbery and Aldrich, of Watervliet, M., for use, benefit, and security of Isaac N. Swain, of Palmer, Mass., against loss or damage by fire, to the amount of five thousand five hundred dollars, viz:

112	$1,500 on the saw mill, situate at Watervliet,	@	4	℔ 60 00
	1,000 on the grist mill, do. do.	@	3	℔ 30 00
2,700	on the hotel and store connected and in one risk,		3	℔ 81 00
300	on the wooden building used as boarding-house,		1½	℔ 4 50
$5,500				$175 50

All situate in the town of Watervliet, Berrien county, Michigan, and more particularly described in application No. 411 and the diagram thereof on file in the office of the company at Cincinnati, Ohio. This company have notice of the following insurances on said property, viz:

$3,000 in Washington Union, on saw mill. $1,500 in Phœnix Co., Hartford, on same. $2,000 in Washington Union, on grist mill. $1,200 in same company, on hotel and store.

Dated Oct. 10, 1857, and expires Oct. 10, 1858, at noon.

RODNEY C. PAINE.

Endorsed: The within is a true copy of the entries on the insurance record of the agency of the Ætna Ins. Co. at this place, made by me as agent on the 10th day of October, 1857. Dated at Niles, Michigan, May 30, 1863. R. C. Paine.

Exhibit C.

Ætna Insurance Company, No. 369.

By this policy of insurance, the Ætna Insurance Company, in consideration of sixteen dollars to them paid, by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbery and Aldrich, against loss or damage by fire to the amount of eight hundred dollars, on their frame building, occupied as a tavern, and situated in the village of Watervleit, Berrien county, Michigan, and more particularly described in survey and diagram No. 369 on file in this office, and which is hereby made a part of this policy.

This company has notice of the following insurance on said property. Eight hundred in Washington Union Insurance Co., Cleveland, Ohio, for one year from the 30th May, 1856, to the 30th May, 1857.

RODNEY C. PAINE.

Endorsed: The within is a true copy of the entries in the
113 insurance record of the agency of the Ætna Ins. Company at this place, as appears by the record in the handwriting of Geo. W. Hoffman, agent of the company at the date thereof. Dated at Niles, Michigan, August 22d, 1864. R. C. Paine, agent Ætna Ins. Co., Niles, Mich.

Exhibit D.

Ætna Insurance Company, No. 370.

By this policy of insurance the Ætna Insurance Company, in consideration of twelve 50-100 dollars to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbery & Aldrich against loss or damage by fire to the amount of five hundred dollars, on the frame grist mill situate in the village of Watervliet, Berrien county, Michigan, and more fully described in survey No. 370, on file in the office of the agency of this company, at Cincinnati, Ohio, and which is hereby made a part of this policy.

$500 in the Washington Ins. Co. of Cleveland, Ohio.

$2,000 in Jackson Mutual Ins. Co. of Jackson, Mich., for 1 year from 30 May, 1856, to 30 May, 1857.

RODNEY C. PAINE.

Endorsed: The within is a true copy of the entries in the insurance records of the agency of the Ætna Insurance Company of this place, as appears by the record in the handwriting of Geo. W. Hoffman, agent of the company at the date thereof. Dated at Niles, Michigan, August 22d, 1864. R. C. Paine, agent Ætna Ins. Co., Niles, Mich.

The complainants, further to maintain the issue on their part, offered and read in evidence two depositions of James F. Aldrich, as follows, to wit:

114 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Henry Martin, esq., greeting:

[SEAL.] Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine James F. Aldrich, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part of the complainants, upon the interrogatories annexed to this commission, and, therefore, you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said James F. Aldrich to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit court of the United States, before the judges thereof, with all convenient speed.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this first day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-eighth.

A. SCOTT SLOAN, *Clerk.*

115 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of the respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court of the city of Milwaukee, in the said district of Wisconsin, this first day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-eighth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

116 Interrogatories to be administered to James F. Aldrich, of the city of Providence, in the State of Rhode Island, to be produced, sworn, and examined under and by virtue of the annexed commission, before Henry Martin, esq., residing in said city of Providence, in a certain cause now pending and at issue in the circuit court of the United States for the district of Wisconsin, wherein

Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part and behalf of the said complainants:

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Do you know the parties, complainants and defendant, in the title of these interrogatories named, or either and which of them, and how long have you known them, or either and which of them?

Third interrogatory. Where did you reside from and including the year 1855, to and including the year 1858; and during that time in what business were you engaged; and where, with whom, and if any, under and in what firm, name, or names?

Fourth interrogatory. State whether or not you were one of the members of the partnership or firm of Medbery & Aldrich, at Watervliet, State of Michigan; and if yea, when, during what time, and what was the business of said firm?

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118 Fifth interrogatory. State whether or not you are acquainted with the real estate purchased by John Medbery and yourself of the defendant. If yea, where is the same situated; what improvements, if any, were made and erected thereon by Medbery & Aldrich; when and at what place, and what was the cost of such improvements? What was the cost of the large saw mill, as built by Medbery & Aldrich? When was the building of said mill commenced, and when completed and in running order? Who made or built the foundation upon which said saw mill was erected, and how long previous to the building of said mill? Was said mill built upon the foundation commenced in the fall of 1854? Who superintended the building of said mill?

Sixth interrogatory. What was the size of the saw mill as completed, including those portions or parts not under cover? What were the dimensions of that part of said mill under cover, and that part not under cover, and by what name is that part of said mill not under cover called or known, and for what purpose used?

119 When was the room, or that part of said mill used for edging lumber, situate, and what were the dimensions thereof, and was the same under cover, or how otherwise? Have you previously included in your statement of the dimensions of that part of said mill or room used for edging lumber?

Seventh interrogatory. How long have you been engaged in the business of sawing lumber? Have you had experience, and what, in the building of saw mills, and when?

Eighth interrogatory. State whether or not, in your opinion, the platform connected with the saw mill, as built by Medbery & Aldrich, is a necessary part of said mill. If yea, give your reasons therefor.

Ninth interrogatory. What, in your opinion, would be the value of a saw mill erected upon the same premises as the mill erected by Medbery & Aldrich, of the dimensions of fifty by one hundred and

fifty feet, as compared with the saw mill erected by Medbery & Aldrich, and why? State fully.

Tenth interrogatory. If any, what were the causes or rea-
120 sons for the building of the saw mill erected by Medbery & Aldrich from one of the dimensions of fifty by one hundred and fifty feet? Were any requests or suggestions as to such change made by the defendant, and what? Was such change known or made known to the said defendant? When, where, and by whom? Did the defendant make any objections to such change, or how otherwise? What did he say, and in whose presence?

Eleventh interrogatory. State whether or not the defendant was present at any time during the building of the said saw mill? If yea, when and how often?

Twelfth interrogatory. State whether or not Medberry and Aldrich insured or procured to be insured the said mill property. If yea, when, how soon after said mill was completed, and in running order, in what insurance companies, and for what amounts? Where was said insurance procured? Did such policies of insurance come into your possession? If yea, how, from whom, and what did you do with them; to whom did you deliver them?

Thirteenth interrogatory. If, in answer to the last interro-
121 gatory you shall state that you delivered the policies of insurance therein referred to, to the defendant, state whether or not such policies of insurance were assigned to the said defendant. Were such policies of insurance accepted or refused by the said defendant, and did the defendant make any, and if any, what objections to such policies of insurance?

Fourteenth interrogatory. State whether or not Medbery and Aldrich, or either of them, insured or caused to be insured the said saw mill during the years 1857 and 1858. If yea, when and in what companies, and for what amounts? If nay, why not, and at whose suggestion or request?

Fifteenth interrogatory. In the contract for the sale and purchase of lands referred to in the 5th interrogatory bearing date the 28th day of September, 1854, executed by the defendant John W. Medbery and yourself, is contained the following paragraph:

"III. It is agreed and understood by the parties to this agreement
122 that after the payment of the said ten thousand, ($10,000,) then, or within twenty days thereafter said party of the first part agrees to execute or cause to be executed to the parties of the second part, their heirs or assigns, a good and sufficient warranty deed for the said lands above described, and not reserved from this sale, with the rights, privileges and appurtenances thereunto belonging, upon and at the same time the said parties of the second part shall execute to the said party of the first part good and satisfactory security upon other property for the amount of six thousand and sixty-six and ⅔ dollars, ($6,666 ⅔.) and also their bond and mortgage upon the lands above described, and not reserved from the sale with the rights, privileges, and appurtenances thereunto belonging, conditioned to pay the said party of the first party the said forty thousand

dollars ($40,000) as above stated, in eight equal installments of five thousand ($5,000 00) each, and interest as above stated, and also for any amount at any time remaining over due and unpaid the same shall be considered as money loaned, and bearing interest
123 thereon at the rate of ten per centum per annum, which interest shall also be paid annually." What was the understanding, intent, and purpose of the parties to said contract and reference to that part of said contract and paragraph III, which are understood as above, and why inserted in said contract, and how was the amount of $6,666 $\frac{2}{3}$ arrived at? State fully. What was said by the defendant in reference toward the requiring of such further or other security?

Sixteenth interrogatory. State whether or not the security upon other property, as specified in said contract and paragraph III thereof, was given by the said parties of the second part to said contract, or either of them. If yea, by whom, upon what property, and where situate?

Seventeenth interrogatory. State whether or not there was any understanding and agreement at any time other than that specified in said written contract and paragraph III thereof, between the defendant John W. Medbery and yourself, that other security was to be given upon other property by Medbery and Aldrich, or either of them, for the payment of the mortgage executed and delivered by
124 John W. Medbery and yourself to the defendant, upon the property purchased of the defendant.

Eighteenth interrogatory. Attached to the mortgage, which is the subject-matter of this suit, executed by John W. Medbery and wife to the defendant upon an undivided third part of lots 7, 8, 9, and 10, and the Empire mill, block 32, 2d ward of the city of Milwaukee is an agreement executed by the said defendant as follows, to wit: "It is hereby stipulated and agreed by the said party of the second part within named that if, within two years from this date, the large saw mill, 50 by 150 feet in size, shall be properly built and completed upon the foundation commenced last fall by driving piles, which is on the premises described in said mortgage mentioned as being executed by the said John W. Medbery and James F. Aldrich, and their wives, to accept in place of the within mortgage security in proper fire insurance policy or policies on said large saw mill, and thereupon to discharge the within mortgage, to which stipulation and agree-
125 ment, well and truly to be complied with, he hereby binds and obligates himself, his heirs, administrators, and assigns.

"ISAAC W. SWAIN. [SEAL.]

"Dated April 14th, 1855.

"In presence of—
"WILLIAM WALLACE STEWART.
"A. LANDON, Jr."

State whether or not you was present at the time of the drawing or execution of the said mortgage and agreement; was you present during the interview between the said defendant and John W. Med-

bery, at which was discussed the subject of said mortgage and agreement, and preceding the execution thereof. If yea, state what was the understanding of the parties as to the purposes for which said mortgage and agreement were executed, and what said by the defendant Swain.

Nineteenth interrogatory. State whether or not, at the time or previous thereto of the execution of the contract of sale referred to in the 15th interrogatory, there was any understanding or agreement between the said defendant and John W. Medbery and yourself in reference to the building of a large saw mill, and especially as to the dimensions and location of said mill. If yea, state what was
126 such agreement.

Twentieth interrogatory. What was the value of the saw mill as built by Medbery and Aldrich? What would have been the value of a saw mill built of the dimensions, and as specified in the agreement, attached to the 18th interrogatory? Which of the said mills would have been the more valuable, wherein, and why? State fully.

Twenty-first interrogatory. State whether or not, in your opinion, a saw mill of the dimensions of fifty by one hundred and fifty feet, built and erected upon the same premises and upon the foundation specified in the agreement attached to the 18th interrogatory would have admitted of the construction of by more substantial, safe and light bulkhead, and of any better railway facilities for passing logs and lumber through the length of the mill from said carriage to said carriage, and thereon when manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by said Medbery and Aldrich?

127 Twenty-second interrogatory. How, in your opinion, was the bulk-head in the saw mill as built by Medbery and Aldrich constructed having reference to its strength, durability, &c., or was it imperfect and dangerous, or how otherwise?

Twenty-third interrogatory. State whether or not, in your opinion, the mill as built by Medbery and Aldrich was well and properly built. Was such mill built upon the foundation commenced the fall previous to April 14th, 1855?

Twenty-fourth interrogatory. Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully, and at large in your answer.

N. C. GRIDLEY, *Compl't's Sol'rs.*

128 Circuit court of the United States, in and for the district of Wisconsin.

STEPHEN H. SEAMENS, *et. al.*, }
vs. }
ISAAC N. SWAIN. }

And now comes the said defendant, by Finches, Lynde, & Miller, his solicitors, and excepts to the interrogatories propounded by the

solicitor of said complainants to the witness James F. Aldrich, as follows, to wit: To so much of the fifth direct interrogatory as calls for the value of the improvements erected by Medbery and Aldrich, and the cost of said improvements, and the cost of the said saw mill as built by said Medbery and Aldrich. To so much of said 6th direct interrogatory as calls for dimensions of anything outside of the saw mill, and not under cover; and to the 7th, 8th, 9th, and 11th direct interrogatories as calling for testimony that is irrelevant, incompetent, and immaterial; and to the 15th direct interrogatory, for the reason that it calls for testimony that is irrelevant and immaterial, and calls for the legal opinion of the witness, and calls for conclusions of law, and seeks to explain by parole evidence the contents of a written agreement; and to the 17th interrogatory for the reason that it calls for testimony that is irrelevant, immaterial and incompetent; and to the 18th interrogatory for the reason that it calls for testimony that is irrelevant, incompetent, and immaterial, and seeks to explain by parol evidence a written agreement; and to the 19th interrogatory for the reason that it calls for testimony that is irrelevant, incompetent, and immaterial; and to the 20th interrogatory, for the reason that it calls for testimony that is irrelevant, incompetent, and immaterial; and to the 21st interrogatory, 22d, and 23d, for the reason that they call for testimony that is irrelevant, incompetent, and immaterial, and seek to prove opinions of the witness as to the uses of a building such as is not called for by the contract, and for the reasons that the said opinions are not relevant or material to anything at issue in this cause.

And said defendant, not waiving his said objections, joins in said commission, and propounds to the said witness the following cross-interrogatories:

129 Cross-interrogatory:

First cross-interrogatory. Did the said Medbery & Aldrich ever at any time, and when, properly build and complete a saw mill, fifty feet by one hundred and fifty feet, upon the foundation commenced in the fall of 1854, by the driving of piles, and being on the premises described in the mortgage executed to the defendant by yourself and wife, and John Medbery and wife?

Second cross-interrogatory. If you shall state that the said Medbery & Aldrich did properly build, and construct, and complete a saw mill fifty by one hundred and fifty feet, upon the foundations commenced by the driving of piles in the fall of 1854, please state what way the said saw mill was fifty feet, and which way the said saw mill was one hundred and fifty feet.

Third cross-interrogatory. Was the said saw mill fifty feet north and south by one hundred and fifty feet east and west, up and down the stream? Give the point or place at which you commence to measure the one hundred and fifty feet, the direction you run, and at what point you end. Is the said saw mill one hundred and fifty feet east and west, up and down the stream?

Fourth cross-interrogatory. Were not the piles, which were driven

in 1854, for the foundation of a saw mill to be built by Med-
130 bery & Aldrich, driven at the east end of the contemplated mill, and did they not drive up the stream, and towards the west?

Fifth cross-interrogatory. Was there an old saw mill standing on the south side of Mill Creek Race at the time of the sale of the premises to you and Medbery? And was not said old saw mill torn down by Medbery and yourself, or by your or their orders or directions; and if yea, for what reason was the same torn down? Was it not necessary to tear down said saw mill in order to build properly a mill fifty by one hundred and fifty feet in length, upon the foundation commenced by driving piles in the fall of 1854, and was not said old saw mill torn down for that purpose?

Sixth cross-interrogatory. Was said old saw mill used during a portion of the fall of 1854 for sawing and sharpening piles? Who used the said old saw mill for that purpose?

Seventh cross-interrogatory. Was there also a shop standing on the south side of the said Mill Creek Race, used or occupied by the deaf and dumb brother of the defendant? If yea, how far below said old saw mill did said shop stand, and how, and in what manner was said shop supplied with the necessary amount of water to
131 work the machinery in said shop? Was said shop removed by said Medbery & Aldrich, or under their or either of their directions, and when?

Eighth cross-interrogatory. What is the width of the saw mill, as built by Medbery & Aldrich? What is the length of the saw mill, as built by Medbery & Aldrich?

Ninth cross-interrogatory. Does your answer to the last cross-interrogatory take in the platforms, the erections against the side of the saw mill, called an edging room, or is it the saw mill building? If your answer to the last preceding cross-interrogatory does include the platform & the edging room, please give the size of the saw mill without reference to the platform & edging room.

Tenth cross-interrogatory. Is not the size of the saw mill building sixty feet by sixty feet? If not, state what other things are included in your estimate outside of the mill building.

Eleventh cross-interrogatory. Is the edging room any part of the original saw mill building? Was it ever framed into the saw mill building? Was it ever anything more than annexed to the saw mill building? Could it not be taken down to-day without distubring
132 a single timber of the saw mill building? Was not the siding knocked off the original saw mill building to make a place for nailing up joists? Is the edging room anything more than a balloon frame?

Twelfth cross-interrogatory. Is the platform any part of the saw mill building? Is the platform any more part or parcel of the saw mill building than is the railroad or the slide? Do not all saw mills have a platform, and is not a platform necessary to all saw mills? Would it not be as correct to call the railroad, upon which the lumber is carried away from the mill & the slide, a part of the saw mill, as

to call the platform a part of the saw mill? If not, please state what reason there is for calling the platform a part of the saw mill building, & not calling the railroad track or slide a part of the saw mill building.

Thirteenth cross-interrogatory. Was you present, & around & about the work during each & every day the bulkhead was being built to the saw mill erected by Medbery & Aldrich, at Watervliet, in the State of Michigan? If yea, who drove the piles for the bulkhead or the foundations of the bulkhead? Was the party employed by the day or by the contract? How & in what manner were the piles driven?

133 Fourteenth cross-interrogatory. Did the said bulkhead to said saw mill give away immediately, or soon after the water was let on to it? If yea, at what place, & at or near what corner of the mill?

Fifteenth cross-interrogatory. Was the bulkhead frequently out of order? Did you not frequently repair the same?

Sixteenth cross-interrogatory. If you shall state, in answer to any to any of the preceeding interrogatories, that you was not present day by day, & each day that the foundations were being laid for the bulkhead, & the bulkhead being built, please state how you knew that said bulkhead was strong, or durable, or perfect & safe for the size & capacity of the mill.

Seventeenth cross-interrogatory. Was said bulkhead ever at any time placed upon a good, safe, & solid foundation? If yea, what was the character of the said foundation?

Eighteenth cross-interrogatory. Was said bulkhead ever properly constructed? If yea, how did it happen that said bulkhead was frequently out of repair?

Nineteenth cross-interrogatory. Was not John W. Medbury

134 the superintendent of the driving of the piles? Did not said Medbury give directions about the driving of the piles for the foundation of the bulkhead, & for the bulkhead?

Twentieth cross-interrogatory. What time in the spring of 1854, giving the month, (& the day of the month, if you can,) did the work of driving piles for the foundations of the saw mill, fifty by one hundred & fifty feet, commence, & how long did the said work for said saw mill continue?

Twenty-first cross-interrogatory. Was a change made in the shape & size of the mill? If yea, at what time in the spring was said change made? Who suggested the said change, & for what purpose was the change made?

Twenty-second cross-interrogatory. Did Medbery & Aldrich take in a third party, & give him any, & what interest in the said saw mill, or the profits thereof? If yea, what was the name of the said third party? What was the nature of the interest that third party was to have? Was the shape & size of the said saw mill changed at the suggestion of the said third party, & what reason did said third party assign for said change?

Twenty-third cross-interrogatory. Was the saw mill, as built by

Medbery & Aldrich, constructed in pursuance of the said
135 change? If yea, what was the difference in both shape & size of the saw mill built, & one built fifty by one hundred & fifty feet? Did it not make the saw mill, as built, some ten feet wider? Did it not make the said saw mill as built much shorter? Did it give as much room lengthwise of the mill as it would have been had it been fifty by one hundred & fifty feet? Did it cost as much as a mill fifty by one hundred & fifty feet properly built? Did it not necessitate an entire change in the use of the water power? Could each & every building & shop upon the stream be as well & as thoroughly supplied with water as if the saw mill had been completed in all respects as agreed upon, when it was agreed that the saw mill should be properly built upon the foundation commenced by the driving of the piles in the fall of 1854, & be fifty by one hundred & fifty feet?

Twenty-fourth cross-interrogatory. Did Medbury & Aldrich ever, & when, procure policies of insurance upon a mill erected by them upon the premises described in a certain mortgage executed by John W. Medbury & wife, & yourself and wife, to the defendant, upon a saw mill fifty by one hundred & fifty feet, properly built upon foundation commenced by the driving of piles in the fall of 1854? If yea, which one of the said Medbury & Aldrich obtained a policy or poli-
cies of insurance upon such a mill, & in what company or com-
136 panies? Who made the applications for such insurance, who got up the descriptions of the property, & how was said saw mill described? Was said applications verbal or in writing? Did any insurance agent make a survey or examination of the property? If yea, what is the name of such insurance agent? Where did he reside at the date of the obtaining of the said insurance, & where does he now reside?

Twenty-fifth cross-interrogatory. Was the mill erected by Medbury & Aldrich built upon the foundation commenced by the driving of piles in the fall of 1854? If yea, how much, & what part of said saw mill is upon said piles? State the particular part of said saw mill which stands upon said piles, & the distance it runs upon said piles east & west, north south.

Twenty-sixth cross-interrogatory. State how soon in the spring of 1855, after piles had been driven, before Medbury & Aldrich concluded to change the shape & size of the mill. Was it as early as the first of May, or was it not as late as the middle of May, 1855? Was you at Watervliet when the change was made? Was you consulted about the change? Was you in Watervliet, in the State of Michigan, during the entire spring & summer of 1855?

Twenty-seventh cross-interrogatory. Did it become neces-
137 sary, in the construction of the saw mill erected by Medbury & yourself, at Watervliet, in the State of Michigan, to remove from the race-bank the shop occupied by the mute brother of the defendant? Was said shop removed *removed* from its foundation? How far was said shop removed from the race bank? How, & in what condition was said shop left upon the race bank? What became of the foundation of said shop?

Twenty-eighth crosss-interrogatory. How long since you have been at Watervleit? Did said Medbury and yourself sell out any interest in said mill property, and to whom?

Twenty-ninth cross-interrogatory. Would not a saw mill, fifty by one hundred and fifty feet, if the one hundred and fifty feet was lengthwise of the mill, better enable the passage of a log in sawing from one gang of saws to another, by continuing them along one after the other, than in a saw mill sixty feet square? And would not the space fifty feet wide be sufficient to work successfully a mill of that length?

Thirtieth cross-interrogatory. Would not a saw mill, properly built fifty by one hundred and fifty feet, built upon the foundations commenced by driving piles in the fall of 1854, have cost more money than the saw mill which was built by Medbury and Aldrich?

138 Did Medbury & Aldrich ever build and complete more than one saw mill upon the premises described in the mortgage of John W. Medbury and wife, and yourself and wife, to the defendant, or in the town of Watervleit?

Thirty-first cross-interrogatory. Do you know, of your own knowledge, the character of the foundation upon which the bulkhead of the saw mill, erected by Medbury and yourself, at Watervleit, Michigan? if yea, state the character of the foundation, and state how, and in what manner the piles for the bulkhead were driven, and state if you saw each and all the piles driven.

Thirty-second cross-interrogatory. What was the character of the soil, and its foundation for a bulkhead at a point at or inside of the foundation of the old saw mill on the south side of the race? Have you ever examined personally the soil and the foundations of the old saw mill? Was not the object in tearing down the old saw mill to place the foundation of the bulkhead for the new saw mill, of fifty by one hundred and fifty feet, upon the soil or bottom upon which the foundations of the old saw mill stood? Was not this the important reason for tearing down the old saw mill?

Thirty-third cross-interrogatory. Does the saw mill, built by Medbury & Aldrich, at Watervleit, stand upon the foundations of the old saw mill? if yea, state whether, if the said Medbury &

139 Aldrich had erected a saw mill upon the foundations commenced by driving the piles in the fall of 1854, fifty by one hundred and fifty feet, it would have extended up the stream above the point where the foundations of the old saw mill stood, and how far above.

Thirty-fourth cross-interrogatory. As the saw mill built by Medbury & Aldrich is constructed at Watervleit, in the State of Michigan, state how, and in what manner the lumber is carried from one gang of saws to the other. Did said saw mill have a crane? State the manner in which the lumber was handled in the said saw mill, commencing with the slabber saw, and carrying it through the different gangs of saws, and out of the saw mill and on to the railroad track.

Thirty-fifth cross-interrogatory. In your opinion, is said saw mill,

as constructed, as convenient or more convenient for the manufacturing of lumber, than a saw mill so constructed that the gangs of saws would follow one after the other, and carry the lumber out of the mill? Would it not be easier to handle the lumber by having the gangs of saws so that the lumber should be carried from one gang to the other lengthwise of the mill, instead of having them so that the lumber should be carried by rollers, or a crane, sideways, from one gang of saws to another gang of saws?

140 Thirty-sixth cross-interrogatory. How much more would a saw mill, properly built, fifty by one hundred and fifty feet, be worth, and cost, than a saw mill sixty feet square, built as was the saw mill erected by Medbury and Aldrich?

Thirty-seventh cross-interrogatory. If you shall state that the saw mill erected by Medbury & Aldrich was more valuable than a saw mill properly built, fifty by one hundred and fifty feet, please state whether there would be any more lumber or materials used in the construction of a saw ~~said~~ mill fifty by one hundred and fifty feet, than the saw mill built; and whether it would not require, to properly build and construct a saw mill, fifty by one hundred and fifty feet, tha none sixty feet square, and complete it at the same time; and whether said saw mill, of fifty by one hundred and fifty feet, would not require more and different machinery. State the difference, in your opinion, of the cost of properly building a saw mill fifty by one hundred and fifty feet, and the saw mill which was built by Medbury and Aldrich.

Thirty-eighth cross-interrogatory. If, in answer to the twelfth direct interrogatory, you shall state that you did deliver to the defendant any policy of insurance obtained upon the saw mill built by Medbury & Aldrich, please state when you delivered said policy of insurance, where you delivered it, who was present, and state

141 who the agent was that issued the said policy, and in what company was said policy obtained, and what kind of insurance company was the same insured in, and where is said insurance agent living at this time; where did he live the last that you know of him?

Thirty-ninth cross-interrogatory. Did said policy of insurance insure, or purport to insure, a saw mill fifty by one hundred and fifty feet?

Fortieth cross-interrogatory. Did said Medbury & Aldrich pay and keep paid the premium upon any such policy of insurance?

FINCHES, LYNDE & MILLER,
Solicitors for Def't.

Endorsed: U. S. circuit court, dist. of Wisconsin. Stephen H. Seamans, *et al*, *vs.* Isaac N. Swain. Cross-interrogories.

142 Deposition of James F. Aldrich, of the city and county of Providence, in the State of Rhode Island, a witness about forty-two years of age, taken before Henry Martin, a commissioner duly appointed, the annexed commission issued by A. Scott Sloan, esquire, clerk of the circuit court of the United States of America

for the district of Wisconsin, to be read in evidence on the part of the plaintiffs, on the trial of a suit now depending before the circuit court of the United States of America, in which suit. Stephen H. Seamans, Catharine M. Stevens, and Edward ~~S. Whitney~~ P. Whiting, are plaintiffs, and Isaac N. Swain, is defendant.

The said James F. Aldrich being produced, sworn, and examined upon the interrogatories on the part of the plaintiffs, deposes and swears, as follows:

To the first interrogatory this deponent says, My name is James F. Aldrich; my age, is forty-two years; my occupation, dealer in produce; my residence, Providence, Rhode Island.

To the second interrogatory he says, I have some acquaintance with each and all of the parties. I have known the defendant for twenty years, and the plaintiffs, more or less, for ten years.

To the third interrogatory he says, In Chicago, Illinois, engaged in the lumber business, there and at other places with Aldrich, Smith & Co., and B. F. Aldrich & Co., and Medbery and Aldrich.

To the fourth interrogatory he says, I was from the commencement of said firm until the close of the firm business, from
143 1854 to 1859; our business was manufacturing lumber.

To the fifth interrogatory he says, I am some acquainted with the real estate purchased of the defendant at Watervliet, Berrian county, Michigan; a small part of the purchase was in Van Buren county, Michigan. Large improvements were made in mills built, &c., at Watervleit, on the Paw-paw river. Costs of improvements made 1854, '5 and '6, were from thirty-three to thirty-five thousand dollars. The cost of the large saw mill was between thirty-one and thirty-two thousand dollars. It was commenced in the fall of 1854; it was completed and in running order in the spring of 1856. One Martin Ruggles built the most part of the foundation upon which the saw mill was erected. The building was commenced very soon after the foundation was ready. The mill was built upon most or all of the foundation that was commenced in 1854. Col. H. A. Miller superintended the building of said mill.

To the sixth interrogatory he says, The size of the mill built was seventy-eight feet by one hundred feet. Sixty by seventy-eight feet was under cover, and the remainder, forty by seventy-eight feet, I think, was not under cover. The part not under cover was called the platform; such platform was essential and used for running lumber upon and many other uses. Some portion of the platform was used for edging lumber and was essential for that purpose.

To the seventh interrogatory he says, About twelve years.
144 I have had some experience in building saw mills, and was a member of the firm that built a large saw mill at Two Rivers, Wisconsin.

To the eighth interrogatory he says, I consider the platform an indispensable necessity to a first class mill for edging, assorting, and piling lumber, and many other uses.

To the ninth interrogatory he says, In my opinion, based in part upon the testimony of others, perfectly competent to judge, I should

not think that a mill built of the dimensions of fifty by one hundred and fifty feet, worth to exceed two-thirds the amount of the one built by Medbery and Aldrich, and one reason for such conclusion is, it would have been impossible to put in three gangs of saws, as I have been informed, and verily believe, in a mill built of the dimensions of one hundred and fifty by fifty feet, and could they have been put in, would have been attended, with a very largely increased expense in running.

To the tenth interrogatory he says, The change of size was for the reason, that we, Medbery and Aldrich, our superintendent and other competent men, thoroughly competent to judge, decided that a building seventy-eight feet by one hundred feet, the size that the mill was built, would make a much more valuable mill, a mill that would make much more lumber, and at much less expense, than a mill built of the dimensions of one hundred by one hundred and fifty feet.

145 I talked with the defendant relative to the change of size; he expressed himself satisfied and in no way demurred, but said he thought it would cost more money.

To the eleventh interrogatory he says, I saw the defendant at Watervliet once during the time of the building of said mill, and have reliable information of his being there once besides.

To the twelvth interrogatory he says, In the spring of 1856, (I received, I think, from my partner J. S. Steward,) policies of insurance, I think three on said mill, amounting to six hundred dollars, procured for the defendant, and which I afterward handed to the defendant, I think, at Chicago. Said policies were received very soon after said mill was completed. I do not now remember the name of the companies that issued the policies; they were procured at Niles, Michigan; I think by J. S. Stewart.

To the thirteenth interrogatory he says, I do not now recollect whether said policies were made direct or assigned to the defendant; they were accepted by the defendant without objection. I think, however, that at that time he remarked, that he knew little or nothing about one of the companies.

At this period the taking of the testimony was adjourned to Saturday, July twenty-third, and taking of the testimony resumed, on that day.

HENRY MARTIN, *Commissioner*.

146 To the fourteenth interrogatory he says, I think Medbery and Aldrich procured one or more policies of insurance on said mill in 1857 or 1858, but did not procure more for the reason that the defendant asked the privilege of obtaining other insurance for himself, which request was granted, and the defendant procured policies of insurance for himself, the premiums on which were subsequently paid by me to the defendant, and this was the only reason why Medbery and Aldrich did not obtain further insurance.

To the fifteenth interrogatory he says, The understanding and purpose for which security was given the defendant upon property other than that purchased of defendant, was to cover, including the

ten thousand dollars ($10,000) paid defendant, one-third of the purchase money. This was the way $6,666 ⅔ dolls. was arrived at, which added to $10,000, makes one-third of fifty thousand dollars, ($50,000,) the purchase price, and he, the defendant, said to me, that the security given upon property outside of the property purchased by Medbery and Aldrich of defendant, should be released when the contemplated expenditure of building the mill was made or the payments made reached one-third of the purchase money, and when I positively declined giving such outside security, he said that he had talked with my other partner, Mr. Medbury, about giving such security on his, Medbury's, interest on the Empire mill in the
47 State of Wisconsin, city of Milwaukee, and said that it would do him no harm, as it would soon be released.

To the sixteenth interrogatory he says, Security on other property was given defendant, by J. W. Medbury, of the late firm of Medbury and Aldrich, on the Empire mill at Milwaukee, Wisconsin.

To the seventeenth interrogatory he says, There was no other understanding or agreement at any time to my knowledge, save the conversation or verbal agreement given in answer to the fifteenth interrogatory, except what is embraced in paragraph III, in the fifteenth interrogatory.

To the eighteenth interrogatory he says, I cannot say whether I was or was not present at the time of the final execution of the mortgage by J. W. Medbury, and wife, upon the Empire mill and lands at Milwaukee. I heard the matter somewhat discussed between Medbury and defendant, heard the defendant say he considered the property good security for two-thirds of its purchase price under any circumstances, and never heard him demand security outside of property purchased, for more than balance unpaid of one-third of the purchase money, and that only until said one-third of the purchase money was paid or certain improvements and investments made as before specified.

To the nineteenth interrogatory he says, There was, previous to the execution of the contract for the sale referred to in the fifteenth interrogatory, some understanding or agreement between Mr.
148 Medbury and myself, with reference to the building of the mill, cost, size, &c. We talked of building a saw mill, fifty by one hundred and fifty feet, and that it would cost twenty thousand ($20,000) dolllars, but made, I think, no definite agreement, as we were neither of us experienced or practical saw mill builders, and knew but little of what would be the most feasible size or dimensions of building such a mill as we contemplated building.

To the twentieth interrogatory he says, The value of the mill built by Medbury & Aldrich was from thirty to thirty-five thousand dollars. I think a saw mill, built fifty by one hundred and fifty feet, would have been worth one-third less than the one built by Medbury and Aldrich, as I think the last would be an impracticable shape for building a first class gang saw mill.

To the twenty-first interrogatory he says, In my opinion, to have built the mill fifty by one hundred and fifty feet, the character of the

bulkhead would not have been changed, and the facilities for handling and passing logs, slabs, lumber, &c., through the length of the mill, from one saw carriage to another, for railway facilities for running lumber to pile to market, would not have been nearly as convenient as the mill we built. The size and dimensions of the mill built by Medbury & Aldrich admitted of great economy in labor in running the saws, handling lumber, edging, piling, &c., much more so, in my opinion, than could have been attained by a mill of fifty by one hundred and fifty feet.

149 To the twenty-second interrogatory he says, I have but little personal knowledge or experience relative to the building bulkheads; but by practical and competent men the bulkhead built by Medbury & Aldrich was considered, was as well constructed with reference to durability, strength, &c., as the soil upon which it was built would possibly admit of. During the building of said bulkhead I understood the defendant to say the way in which it was built was the only way to build a good, safe bulkhead.

To the twenty-third interrogatary he says, My opinion that the mill, as built by Medbury and Aldrich, was well built, and was a good, substantial, and very convenient mill. Said mill, I think, was built upon all, or at least most part, on the foundation commenced previous to April 14th, 1855.

At this point the taking of the testimony was adjourned to Monday, July 25th, and taking of the same was resumed on that day.

HENRY MARTIN,
Commissioner.

To the twenty-fourth interrogatory he says, I did not, during three (3) years after the bulk-head was built by Medbury and Aldrich, at Watervliet, hear any person find fault with it or take exceptions to the manner in which it was built. The saw mill built by Medbury and Aldrich was the best and most convenient mill I have ever seen or known anything about. I have heard a number of experienced men say the same thing. Lumber could be manufactured at

150 much less expense than in any other mill of which I have any knowledge. In 1857 Medbury & Aldrich let a contract for manufacturing lumber in said mill, at one dollar ($1 00) per *m* feet; the contractor performed but little labor himself, and cleared near one thousand dollars ($1,000) on the contract, while during the same season Aldrich, Smith & Co., (of which firm I was a member,) of Two Rivers, Wisconsin, let the contract for sawing their lumber at two dollars ($2 00) per *m* feet. The contractor worked hard every day, and lost money on the job; and this same mill of Aldrich, Smith & Co. was reported to be a good and convenient mill. The mill that Medbury & Aldrich at one time contemplated building, 50 by 150 feet, was planned by men impractical and without the least experience in building first class gang saw mills; While the one planned of the dimensions as built by Medbury & Aldrich, to wit, 78 by 100 feet, was by men of large experience in building that class of mills. The old shop used sometimes by Russell Swain, a deaf mute, and brother

of the defendant, was a small affair, and but seldom used before its location was changed. I have known Russell Swain, for twelve or fifteen years before this time; he was a farmer in easy circumstances, and was not supposed to be a mechanic as all.

To the first cross-interrogatory this deponent says, Medbury & Aldrich did not at any time, to my knowledge, build a saw mill 50 by 150 feet.

151 To the second cross-interrogatory he says, They did not build such mill.

To the third cross-interrogatory he says, The saw mill was not built of the dimensions of 50 by 150 feet.

To the fourth cross-interrogatory he says, I cannot now say which part of the pile driving was done first.

To the fifth cross-interrogatory he says, There was an old saw mill on the ground purchased by Medbury & Aldrich of the defendant, and as much of it was torn down, and at such times as it interfered with the building of the new mill. I do not know that it was any more essential to tear it down to build a mill 50 by 150 feet, than to build a mill 78 by 100 feet.

To the sixth cross-interrogatory he says, I was at Watervliet but very little in the fall of 1854, and if I ever knew do not now remember who sharpened the piles, or when it was done.

To the seventh cross-interrogatory he says, There was an old shop standing neer the water at Watervliet that was sometimes used by Russel Swain, a deaf mute, and brother of the defendant. I cannot tell the distance said shop was from the old mill, nor can I now tell in just what manner it was supplied with water. The said shop I suppose to have been removed when the work of building the mill had so far progressed as to be in the way of said work.

152 Under whose directions it was removed I cannot tell.

To the eighth cross-interrogatory he says, The saw mill built by Medbury & Aldrich was seventy-eight feet one way by one hundred feet the other.

To the ninth cross-interrogatory he says, My answer to the last cross-interrogatory takes in the platform. The size of the saw mill built by Medbury & Aldrich, not including the platform portion, is sixty by seventy-eight feet.

To the tenth cross-interrogatory he says, The size of the saw mill was not sixty by sixty feet. The size 78 by 100 feet included the platform portion.

To the eleventh cross-interrogatory he says, I consider the platform, including the edging room, a part of saw mill building. I cannot tell how the framework was constructed, nor whether one part could be removed without disturbing the other; nor can I tell in what manner the frame of the platform was constructed.

To the twelfth cross-interrogatory he says, I consider the platform a part of the saw mill building. I consider the railroad a railroad, the slider a slider. All saw mills do not have platforms. I consider the platform, as built by Medbury & Aldrich, an essential part of the building, and is used in the direct manufacture of lumber, while the

railroad is used for taking the lumber from the mill, as the
153 road is used for bringing lumber to the mill.

To the thirteenth cross-interrogatory he says, I was not present on each and every day when the bulkhead was being built, nor do I now remember who drove the piles for the foundation of the builkhead, nor in what manner employed.

To the fourteenth cross-interrogatory he says, I have no recollection of the bulkhead giving away soon after it was built, or after the water being let on to it.

To the fifteenth cross-interrogatory he says, I think that for the first three years the bulkhead was seldom out of order.

To the sixteenth cross-interrogatory he says, The most I know of the strength and character of the bulkhead was from the opinion of men competent to know.

To the seventeenth cross-interrogatory he says, The bulkhead, I think, was generally reputed to be built on a good and solid foundation. The character of the foundation was said to be the very best the soil would admit of.

To the eighteenth cross-interrogatory he says, The bulkhead was supposed to be properly constructed.

To the nineteenth cross-interrogatory he says, I think John W.
Medbury did assist somewhat in driving the piles. I did not
154 suppose him to be the superintendent or give directions.

To the twentieth cross-interrogatory, he says, I cannot now tell in what time of the spring of 1854, the work of driving the piles commenced, nor just how long continued before completion.

To the twenty-first cross-interrogatory, he says, ~~W. E.~~ Medbery & Aldrich first talked of building a mill, 50 by 150 feet, but finding such dimensions not possible for building such a mill as we contemplated, to wit: a first class gang-mill, we changed the dimensions to 78 by 100 feet; this change was made, I think, upon consultation with Col. Miller and J. S. Stewart, men experienced and competent to plan & build the mill contemplated, and the change was made to get a better mill, and one with which we could manufacture lumber with more economy.

To the twenty-second cross-interrogatory, he says, Medbery & Aldrich did take in a third party; he to receive one-third part of the profits of manufacturing lumber; his name was Jonathan S. Stewart. Said Stewart did, with others, recommend the change of the dimensions of said saw-mill, and the reasons were, to build a mill better adapted to the uses contemplated than could have been with a mill of the size of 50 by 150 feet.

At this point, the taking of testimony was adjourned to Tuesday, July 26th, and taking of the same was resumed, on that day.

HENRY MARTIN,
Commissioner.

To the twenty-third cross-interrogatory, he says, The saw-mill, as
built by Medbery and Aldrich, was built, 78 by 100 feet; the
155 difference from a mill built of the dimensions of 50 by 150

feet, was some twenty-eight feet longer, one way, and fifty feet shorter the other way. The mill built by Medbery & Aldrich, gave in the aggregate, some three hundred square feet more room than would a mill of 50 by 150 feet; it cost not less than ten thousand dollars ($10,000) more money than was estimated a mill would cost built 50 by 150 feet. I am not sufficiently acquainted with the application of water to form an idea how it would have been changed in this respect, had the mill been built 50 by 150 feet, nor do I know, that each building upon the stream could not have been as well supplied with water as if the mill had been 50 by 150 feet.

To the twenty-fourth cross-interrogatory, he says, Policies of insurance were procured by J. S. Stewart upon the saw-mill built by Medbery & Aldrich, and were sent to me at Chicago, and by me delivered to defendant. The minutiæ of obtaining such policies I know nothing about, as I think it was done through J. S. Stewart.

To the twenty-fifth cross-interrogatory, he says, I think that the mill built by Medbery & Aldrich was upon most of the foundation commenced by driving piles in 1854. Precisely how much is upon said piles I cannot tell.

To the twenty-sixth cross-interrogatory, he says, I think, I was not at Watervleit when the final dimensions of the mill was agreed upon, nor can I now tell the precise time such conclusion was ar-
156 rived at. I was at Watervleit but very little during the spring of 1855. I was content to allow men of experience, who knew their business, determine what dimensions were best to build a first class gang saw-mill.

To the twenty-seventh cross-interrogatory, he says, I was not at Watervleit at the time of the removal of the shop referred to, but supposed it to have been removed as it interfered with the building of the new mill, and for that purpose only.

To the twenty-eighth cross-interrogatory, he says, It was some time between the spring of 1855, and the fall of 1859, inclusive, at which time I sold out my interest in the property at Watervleit, including said mill, to my brother William Aldrich. I have not been there since. Some little time previous to this, Mr. Medbery sold his interest to Mr. ~~Case.~~

To the twenty-ninth cross-interrogatory, he says, From the statements of every experienced man that I have heard speak upon the subject, I think that a mill built of the dimensions of 50 by 150 feet, would not so well accommodate the passing of logs in sawing, from one gang of saws to the other, as one built of the dimensions of 78 by 100 feet. I think that a mill only fifty feet wide, could not be worth the same, or equal convenience or economy.

To the thirtieth cross-interrogatory, he says, The mill built by Medbery & Aldrich cost some ten thousand dollars ($10,000) more than was estimated to build a mill 50 by 150 feet, & I think
157 the defendant assisted in getting up said estimate. Medbery & Aldrich did not build, nor complete but one mill at Watervleit.

To the thirty-first cross-interrogatory, he says, I know, of my own

knowledge, but little of the character of the foundation for the bulk-head of the mill built by Medbery and Aldrich.

To the thirty-sec. cross-interrogatory, he says, I know, of my own knowledge, very little of the soil at the particular point indicated by this interrogatory. I know of no other object in tearing down the old mill than before given.

To the thirty-third cross-interrogatory, he says. My impression is that the mill built by Medbery & Aldrich does stand upon some portion of the foundation of the old saw-mill. I cannot tell whether the foundation to a mill 50 by 150 feet, would have extended up stream or not. I am not clear that I undersand the interrogatory.

To the thirty-fourth cross-interrogatory, he says, I have seen the working of the machinery in the mill built Medbery and Aldrich, at Watervleit, and have seen that it worked well; have seen a good many gang saw-mills, and several different varieties, and have never seen one that worked as well as this; but I am not sufficiently conversant with sawing lumber to give names of machines, or tell, in a precise manner, the way in which they did their work.

158 To the thirty-fifth cross-interrogatory, he says, In my opinion, the saw-mill constructed by Medbery & Aldrich, at Watervleit, is more convenient for manufacture of lumber than one built in any other way. I have known but one mill where the gangs were put in lengthwise, and I am quite sure that the expense of manufacturing lumber in that mill is fully double the expense of manufacturing in the mill built by Medbery & Aldrich, at Watervleit.

To the thirty-sixth cross-interrogatory, he says. I cannot tell, as I have never been connected with the building of a mill of either size.

To the thirty-seventh cross-interrogatory, he says, I think, judging from the number of square feet contained in the mill built by Medbery & Aldrich, at Watervleit, that there would be some more material used than there would be if built 50 by 150 feet. The mill built by Medbery and Aldrich cost some ten thousand dollars ($10,000) more than was the estimate of building a mill 50 by 150 feet, and I give my opinion, independent of this estimate. I should not have supposed there should have been so much difference. I should think that there would not be much of any difference in building a mill of 150 by 50 feet in labor required in building, nor in amount of machinery used; same difference in kind of machinery from one built by Medbery & Aldrich.

To the first thirty-eighth cross-interrogatory, he says, The policies of insurance, I think, was obtained by J. S. Stewart, at Niles,

159 Michigan, and by him sent to me, at Chicago, and by me delivered to defendant, at Chicago.

To the sec. thirty-eighth cross-interrogatory, he says, Insurance was not obtained on a saw-mill 50 by 150 feet, but upon the saw-mill built by Medbery & Aldrich.

To the thirty-ninth cross-interrogatory, he says, Medbery and Aldrich did pay, and keep paid for some years, at least, the premiums upon the policies of insurance; sometimes the insurance was obtained

by defendant, at his request, and the premiums were subsequently paid to him by me.

JAMES F. ALDRICH.

HENRY MARTIN,
Commissioner.

THE STATE OF RHODE ISLAND,
and County of Providence:

I, the subscriber, a commissioner, duly appointed by the annexed commission, issued from the hon. the circuit court of the United States, for the district of Wisconsin, do certify, that the foregoing deposition was taken by me in the city Providence, and State of Rhode Island, on the twenty-second, twenty-third, twenty-fifth, and twenty-sixth day of July, one thousand eight hundred & sixty-four.

That the said witness was first duly sworn by me, to testify the truth, and nothing but the truth, in answer to the several interrogatories, and cross-interrogatories annexed to said commission, and that the same was carefully read to said witness, and signed by
160 him. Witness this, my hand and seal, this twenty-sixth day of July, A. D. 1864.

[SEAL.] HENRY MARTIN,
Commissioner.

[5-cent revenue stamp, cancelled.]

Fees	$11 00
21 pages	8 40
4 days	12 00
Oath	10
Certificate	50
Stamps	41
	$32 41

161 UNITED STATES OF AMERICA, *Rhode Island District, ss:*

I, Henry Pitman, clerk of the circuit court United States for said district, do hereby certify that I am well acquainted with the handwriting of James H. Parsons, whose name is subscribed to the annexed certificate, and that the signature to the same is in his proper handwriting; and I do further certify, that he was at the time of signing the same a United States commissioner duly appointed by the circuit court of the United States for the district of Rhode Island, first circuit.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this twenty-sixth day of September, A. D. 1865.

[SEAL.] HENRY PITMAN, *Clerk.*

[5 cent revenue stamp, cancelled.]

RHODE ISLAND DISTRICT, *ss:*

Be it remembered, that on the 25th day of September, A. D. 1865, application was made to me, James H. Parsons, a United States commissioner, duly appointed by the circuit court of the said United States, within and for the district of Rhode Island, to take affidavits, acknowledgements of bail, &c., &c., by affidavit, on behalf of Sephen H. Seamens *et al*, stating that said Seamens *et al*, were plaintiffs in a suit then depending in the circuit court of the United States, within and for the district of Wisconsin, wherein Isaac N. Swain was defendant; that the testimony of James F. Aldrich, of Providence, Rhode Island, was necessary for them, the said plaintiffs, in the prosecution of said suit, and that said Aldrich lived more than one hundred miles from Milwaukee, where the court in which said cause was expected by said plaintiffs to be tried, was appointed by law to the held; that Isaac N. Swain, the said defendant, and his attorney, both resided more than one hundred miles from said Providence, Rhode Island, and I was requested, on behalf of said Stephen H. Seaman *et al*, that the said James F. Aldrich might be
162 examined according to the directions of the act of Congress in such case made and provided. Whereupon, I proceeded to take the deposition of said James F. Aldrich, *de bene esse*, and he having been carefully examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, did give the deposition accompanying this certificate and hereto annexed; and I do further certify, that said accompanying and annexed deposition was reduced to writing by me, in the presence of said James F. Aldrich, and by him signed in my presence, and that I am not of counsel or attorney for either of the parties to said suit, nor am I in any manner interested in the events thereof.

JAMES H. PARSONS.
U. S. Commissioner.

Commissioners fees, $10.

[5-cent revenue stamp, cancelled]

U. S. circuit court in and for the district of Wisconsin.

STEPHEN H. SEAMANS *et al*,
vs.
ISAAC N. SWAIN.

Deposition of a witness taken, de bene esse, on behalf of the above-named plaintiffs.

James F. Aldrich, a witness produced and examined, testified in answer to interrogatories propounded on behalf of the plaintiffs, as follows:

In your dposition heretofore taken in the above-entitled suit, you testified that in the spring of 1856, you received from your partner, J. S. Stewart, three policies of insurance on the saw mill built by

Medbury and Aldrich at Watervliet, Michigan, which were sent to you at Chicago, and which you delivered to the defendant at Chicago. Please state the time, day, month, and year when you delivered such policies of insurance to the defendant, Isaac N. Swain?

163 Cannot say certainly, think I might have held those policies some months after receiving them from Mr. Stewart before having opportunity to hand them to Mr. Swain. Think I handed them to him the first opportunity I had; and from my recollection, should say, it was in the autumn, last of September or first of October, A. D. 1856. This is according to the best of my knowledge and belief, and is as definite a belief as my memory will enable me to arrive at.

JAMES F. ALDRICH.

Sworn and subscribed before me this 25th day of September, A. D. 1865.

JAMES H. PARSONS,
U. S. Commissioner.

[5-cent revenue stamp, cancelled.]

The complainants further offered and read in evidence, upon the hearing of this cause, the deposition of J. S. Stewart, as follows, to-wit:

164 THE UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

[SEAL.] The President of the United States of America, to Edward C. Reed, esq., greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority, to examine Jonathan S. Stewart, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen Seamens, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part of the complainants, upon the interrogatories annexed to this commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Jonathan S. Stewart to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal into the said circuit court of the United States before the judge thereof, with all convenient speed.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

I certify that I have executed the within commission, and that the execution thereof appears in certain schedules hereto annexed.

EDWARD C. REED,
Commissioner.

165 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in the said district of Wisconsin, this 19th day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States, the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

166 Interrogatories to be administered to Jonathan S. Stewart, of Homer, Cortland county, State of New York, to be produced, sworn, and examined under and by virtue of the annexed commission, before Edward C. Reed, esq., residing at Homer, in said county of Cortland, State of New York, in a certain cause now pending and at issue in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part and behalf of the said complainants:

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Do you know the parties, complainants and defendant, in the title of these interrogatories named, or either, and which of them, and how long have you known them, or either, and which of them?

Third interrogatory. State whether not you formerly resided at Watervliet, in the State of Michigan; if yea, when, during what years, with whom were you connected in business; and if any, under what firm name, and what was the business of such firm?

Fourth interrogatory. State whether or not you are acquainted with the lands formerly owned by Medbery & Aldrich, and purchased by them from the defendant, situate at and near Watervliet, State of Michigan; if yea, what improvements, if any, were made and erected thereon by the said Midbery & Aldrich? When? What was the cost of such improvements? What was the cost of the saw mill, as built by Medbery & Aldrich, and when was said mill completed and in running order? Who made or built the foundation upon which said saw mill was erected, and how long previous to the building of said saw mill? State whether or not said saw mill was built upon the foundation commenced in the fall of 1854. Who superintended the building of said saw mill?

Fifth interrogatory. State whether or not you had charge of the business of Medbury & Aldrich, at Watervliet, Michigan, in
167 connection with the business of the saw mill as erected by Medbery & Aldrich; if yea, state whether or not you are familiar with the construction and dimensions of said saw mill, as built by Medbury & Aldrich; and was you present most of the time during the building of such saw mill? What were the dimensions of said saw mill, as built by Medbury & Aldrich, including those parts not under cover? What were the dimensions of that part of said mill under cover, and that part not under cover, and by what name is that part of said mill not under cover, called or known, and for what purpose used? Where was the room, or that part of said mill, used for edging lumber, situate, and what were the dimensions thereof, and was the same under cover, or how otherwise? Have you previously included in your statement of the dimensions of said mill, the dimensions of that part of said mill used for edging lumber?

Sixth interrogatory. Have you had experience in the lumber business, and in building of saw mills? If yea, what, when, and where?

Seventh interrogatory. State whether or not, in your opinion, the platform connected with the saw mill, as built by Medbery & Aldrich, was a necessary and indispensible part of said mill; if yea, give your reasons therefor.

Eighth interrogatory. What was the value of the saw mill as built by Medbery & Aldrich? What would have been the value of a saw mill of the dimensions of fifty by one hundred and fifty feet, built upon the same premises upon which the mill of Medbery & Aldrich was built, and upon the foundation built in the fall of 1854, up and down stream? Which of said mills would have been the more valuable, and wherein and why? State fully.

Ninth interrogatory. State whether or not, in your opinion, a first class gang mill could have been built upon the premises aforesaid, of the dimensions of fifty by one hundred and fifty feet, and why. How many gangs of saws could work to advantage in a saw mill of dimensions of fifty by one hundred and fifty feet? How many gangs of saws were contained and used in the mill as built by Medbury & Aldrich?

168 Tenth interrogatory. What, in your opinion, would be the value of a saw mill built upon the same premises as the saw mill erected by Medbery & Aldrich, of the dimensions of fifty by one hundred and fifty feet, as compared with the mill erected by Medbury & Aldrich, and wherein and why?

Eleventh interrogatory. State whether or not, in your opinion, a saw mill of the dimensions of fifty by one hundred and fifty feet, built and erected upon the same premises as the said mill of Medbery & Aldrich, and upon the foundation commenced in the fall of 1854, would have admitted of any better railway facilities for passing logs and lumber through the length of the mill, from saw carriage to saw carriage, and thence, when manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by Medbery & Aldrich, and why.

Thirteenth interrogatory. State whether or not, in your opinion, the saw mill, as built by Medbury & Aldrich, was well and properly built.

Fourteenth interrogatory. If any, what were the causes or reasons for the building of the saw mill, as erected by Medbury & Aldrich, from one of the dimensions of fifty by one hundred and fifty feet? Was such change known, or made known, to the said defendant? If yea, when, where, and by whom, and what was said by the said defendant?

Fifteenth interrogatory. State whether or not you were present at the saw mill of Medbury & Aldrich, and during the erection thereof, at an interview between John W. Medbury and the said defendant, in regard to the change in the dimensions of said mill. If yea, when, and what was said by the said defendant? Did the defendant make any, and if any, what objections, to the change in the dimensions of said mill? Did he assent to and accept such change in the dimensions of said mill? What did the defendant say?

Sixteenth interrogatory. State whether or not the defendant was present at and during the erection of said mill of Medbery & Aldrich, at Watervliet, Michigan. If yea, when and how often did you see him there?

169 Seventeenth interrogatory. State whether or not Medbery & Aldrich insured, or caused to be insured, their said saw mill erected by them at Watervliet during the year 1856. If yea, when and how soon after said mill was completed? By whom was such insurance procured; where, at what office, in what insurance companies, and for what amounts?

Eighteenth interrogatory. If, in answer to the last interrogatory, you shall state that you procured the insurance, or policies of insurance therein referred, state what you did with such policies of insurance. Were such policies of insurance assigned? If yea, to whom?

Nineteenth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY,
Compl'ts' Sol'r.

Circuit court of the United States in and for the district of Wisconsin, in equity.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.

And the said defendant, by Finches, Lynde & Miller, his solicitors, comes and objects to the interrogatories propounded to the witness, Jonathan S. Stewart, under and by virtue of a commission to be issued

Fifth interrogatory. State whether or not you had charge of the business of Medbury & Aldrich, at Watervliet, Michigan, in
167 connection with the business of the saw mill as erected by Medbery & Aldrich; if yea, state whether or not you are familiar with the construction and dimensions of said saw mill, as built by Medbury & Aldrich; and was you present most of the time during the building of such saw mill? What were the dimensions of said saw mill, as built by Medbury & Aldrich, including those parts not under cover? What were the dimensions of that part of said mill under cover, and that part not under cover, and by what name is that part of said mill not under cover, called or known, and for what purpose used? Where was the room, or that part of said mill, used for edging lumber, situate, and what were the dimensions thereof, and was the same under cover, or how otherwise? Have you previously included in your statement of the dimensions of said mill, the dimensions of that part of said mill used for edging lumber?

Sixth interrogatory. Have you had experience in the lumber business, and in building of saw mills? If yea, what, when, and where?

Seventh interrogatory. State whether or not, in your opinion, the platform connected with the saw mill, as built by Medbery & Aldrich, was a necessary and indispensible part of said mill; if yea, give your reasons therefor.

Eighth interrogatory. What was the value of the saw mill as built by Medbery & Aldrich? What would have been the value of a saw mill of the dimensions of fifty by one hundred and fifty feet, built upon the same premises upon which the mill of Medbery & Aldrich was built, and upon the foundation built in the fall of 1854, up and down stream? Which of said mills would have been the more valuable, and wherein and why? State fully.

Ninth interrogatory. State whether or not, in your opinion, a first class gang mill could have been built upon the premises aforesaid, of the dimensions of fifty by one hundred and fifty feet, and why. How many gangs of saws could work to advantage in a saw mill of dimensions of fifty by one hundred and fifty feet? How many gangs of saws were contained and used in the mill as built by Medbury & Aldrich?

168 Tenth interrogatory. What, in your opinion, would be the value of a saw mill built upon the same premises as the saw mill erected by Medbery & Aldrich, of the dimensions of fifty by one hundred and fifty feet, as compared with the mill erected by Medbury & Aldrich, and wherein and why?

Eleventh interrogatory. State whether or not, in your opinion, a saw mill of the dimensions of fifty by one hundred and fifty feet, built and erected upon the same premises as the said mill of Medbery & Aldrich, and upon the foundation commenced in the fall of 1854, would have admitted of any better railway facilities for passing logs and lumber through the length of the mill, from saw carriage to saw carriage, and thence, when manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by Medbery & Aldrich, and why.

Thirteenth interrogatory. State whether or not, in your opinion, the saw mill, as built by Medbury & Aldrich, was well and properly built.

Fourteenth interrogatory. If any, what were the causes or reasons for the building of the saw mill, as erected by Medbury & Aldrich, from one of the dimensions of fifty by one hundred and fifty feet? Was such change known, or made known, to the said defendant? If yea, when, where, and by whom, and what was said by the said defendant?

Fifteenth interrogatory. State whether or not you were present at the saw mill of Medbury & Aldrich, and during the erection thereof, at an interview between John W. Medbury and the said defendant, in regard to the change in the dimensions of said mill. If yea, when, and what was said by the said defendant? Did the defendant make any, and if any, what objections, to the change in the dimensions of said mill? Did he assent to and accept such change in the dimensions of said mill? What did the defendant say?

Sixteenth interrogatory. State whether or not the defendant was present at and during the erection of said mill of Medbery & Aldrich, at Watervliet, Michigan. If yea, when and how often did you see him there?

169 Seventeenth interrogatory. State whether or not Medbery & Aldrich insured, or caused to be insured, their said saw mill erected by them at Watervliet during the year 1856. If yea, when and how soon after said mill was completed? By whom was such insurance procured; where, at what office, in what insurance companies, and for what amounts?

Eighteenth interrogatory. If, in answer to the last interrogatory, you shall state that you procured the insurance, or policies of insurance therein referred, state what you did with such policies of insurance. Were such policies of insurance assigned? If yea, to whom?

Nineteenth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY,
Compl'ts' Sol'r.

Circuit court of the United States in and for the district of Wisconsin, in equity.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
against
ISAAC N. SWAIN.

And the said defendant, by Finches, Lynde & Miller, his solicitors, comes and objects to the interrogatories propounded to the witness, Jonathan S. Stewart, under and by virtue of a commission to be issued

to Edward C. Reed, esq., numbered as follows: to the 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, and 19 interrogatories, for the reason that the said interrogatories, and each of them, call for evidence that is irrelevant, incompetent, and immaterial to the issue of this cause;

170 that said interrogatories, and each of them, seek to change a contract under seal by parol, and to prove a mill built different in shape and size from the one agreed to be built by a sealed contract, and to prove facts not alleged in the pleadings, nor relevant or material to any allegations in the pleadings. And said defendant, not waiving his said objections, but insisting upon them, joins in the said commission, and propounds to the said witness, Jonathan S. Stewart, the following cross-interrogatories:

First cross-interrogatory. Was you ever interested in any way in the business of Medbery & Aldrich, at Watervliet, in the State of Michigan, and what was the nature and character of your interest in that business? Was there ever a written agreement between you and Medbery & Aldrich as to your interest in said business? If yea, annex the same or a copy thereof to your deposition.

Second cross-interrogatory. What year, and what month in the year, did you commence work for Medbery & Aldrich, or as a party in the business with them, at Watervliet, Michigan?

Third cross-interrogatory. How far had the saw mill building, or the foundation for the saw mill building progressed when you first went to work at Watervliet? Had there been any piles driven for the foundation of the said saw mill, and when and by whom?

Fourth cross-interrogatory. What year, and what month in the year, was the original plan of the saw mill changed? Had there been any work done on the foundations in the spring prior to the change in the plan of the mill? Who drove the piles for the foundations of the mill in the spring of 1855, and how and in what manner was the party paid for the driving of the piles? Was he paid by the day, or under a contract for doing all the pile driving?

Fifth cross-interrogatory. Was there an old saw mill standing on the south side of Mill Creek race? If yea, was that torn down to make way for a saw mill to be built fifty by one hundred and fifty feet? And was it necessary, in order to build a saw mill fifty by one hundred and fifty feet, upon the piles driven for the foundation in the fall of 1854, that said old saw mill should be removed, and who removed it?

171 Sixth cross-interrogatory. Was there also standing upon the same side of said Mill Creek race a large shop, used and occupied by a deaf and dumb brother of the defendant, and which was supplied with water by passing through a trunk from a point below the said old saw mill?

Seventh cross-interrogatory. If you shall state that the defendant was present at and during the erection of said saw mill of Medbery & Aldrich, at Watervliet, Michigan, state whether said defendant was at said saw mill at any time after the first few days of the month of April, 1855. If yea, state the number of times, and state how long

and for what period of time he remained in Watervliet the spring and summer of the year 1855.

Eighth cross-interrogatory. Was the defendant present, or around or about the saw mill being built by Medbery & Aldrich, at any time after the change in the plan of the saw mill was made, and before it was completed? If yea, state when you saw him, giving the month, the day of the month, and who was present.

Ninth cross-interrogatory. What suggested the change in the shape and size of the saw mill building? Was the saw mill building erected and completed in pursuance of a change from the original plan? If yea, state how, and in what particular.

Tenth cross-interrogatory. Did Medbery & Aldrich ever, at any time, to your knowledge, construct or build a saw mill fifty by one hundred and fifty feet, upon the foundations commenced by driving piles in the fall of 1854, at Watervliet, Michigan?

Eleventh cross-interrogatory. If yea, which way is the saw mill fifty feet, and which way one hundred and fifty feet? Is the saw mill building erected by Medbury & Aldrich at Watervliet, anything more or less than sixty feet square?

Twelfth cross-interrogatory. Is it not common for all saw mills to have attached to them outside platforms, log-ways, railways, slides, flumes, and booms, and have any of these things anything to do with the size of the saw mill building? Is the platform referred to in the 7th interrogatory any part of the original saw mill building?
172 Is that platform any more a necessary and indispensable part of said saw mill than the log-way, the railway, the slides, flumes, and booms? Do you call the log-way, the railway, or the slides any part of the saw mill building proper? Did the saw mill built by Medbury & Aldrich at Watervliet, Michigan, have a platform attached outside, and a railway, log-way, slides, flumes, and booms?

Thirteenth cross-interrogatory. Was the saw mill which was built by Medbury & Aldrich, at Watervliet, Michigan, properly built, completed, and on a safe, firm, and secure foundation?

Fourteenth cross-interrogatory. Was the bulkhead, under and in front of said saw mill, safe and secure, and were the piles for the foundation of said saw mill and its bulkhead well and securely driven?

Fifteenth cross-interrogatory. Did the said piles and the bulkhead, or any portion of them or it, give way when or soon after the head of water was raised, and did the said saw mill settle on account of their giving way?

Sixteenth cross-interrogatory. Was said bulkhead constantly and frequently out of repair?

Seventeenth cross-interrogatory. If you shall answer the fourteenth interrogatory by saying that the change of the saw mill from fifty by one hundred and fifty feet to the one that was built by Medbury & Aldrich, was known by or made known to this defendant, please state what year, what month, and what day of the month, the said change was made known to said defendant, and where, and who was present.

Eighteenth cross-interrogatory. When did the defendant, to your knowledge, first know of the change in said saw mill? State the day, month, and year.

Nineteenth cross-interrogatory. Was the shop building on the said premises, used and occupied by the deaf and dumb brother of the defendant, removed to make room for the building of the saw mill that was built by Medbury & Aldrich, at Watervliet? If yea, was such removal necessary for the building of the saw mill that they built? If necessary, was the same removed only sufficiently to be reasonably out of the way of constructing said saw mill, and was it left in a condition and with a view of the deaf and dumb brother of the defendant having the same use and occupancy and privilege of said water power, and of good, free, and easy ingress and egress to and from it, the same as he had it before the shop was re-

173 moved by Medbury & Aldrich?

Twentieth cross-interrogatory. Has said shop, to your knowledge, ever been put in any shape, so that the mute brother of the defendant could use and occupy it at all for any purpose? Did the said mute brother, by sign, complain of the destruction of his shop?

Twenty-first cross-interrogatory. Did you ever hear Medbury & Aldrich, or either of them, say anything about the said shop of the said deaf and dumb brother, and the water power connected with it? If yea, state whether said Medbury & Aldrich, or either of them, and which of them, ever spoke about interfering with, destroying, or removing it or its water privileges? State all that you have heard them, or either of them, say about the said brother, or the said shop and its water privileges.

Twenty-second cross-interrogatory. Did the said Medbury & Aldrich, or either of them, ever say anything about restoring the said shop, and placing it in a condition where it could have water privileges? State all that you have ever heard them say on that subject.

Twenty-third cross-interrogatory. State the manner in which said shop was removed, and how and in what manner it was left, and what became of the foundations to said shop. State whether the shop was left in a condition to be used for any purpose, or by water.

Twenty-fourth cross-interrogatory. Did Medbury & Aldrich, to your knowledge, ever procure insurance policies upon a mill fifty by one hundred and fifty feet, built at Watervliet, Michigan, upon foundations made by driving piles in the fall of 1854?

Twenty-fifth cross-interrogatory. Do you know, of your own knowledge, that they ever obtained any insurance policies in any company upon the saw mill built by them in Watervliet, Michigan? If yea, give the date of the said policy, its number, the amount of insurance, and the company in which it was obtained.

FINCHES, LYNDE & MILLER,
Solic. for Defendant.

174 Deposition of Jonathan S. Stewart, a witness produced, sworn, and examined the 27th, 28th, and 29th days of July,

and the second day of August, in the year one thousand eight hundred and sixty-four, at Homer, in the county of Cortland, and State of New York, under and by virtue of a commission issued out of the circuit court of the United States of America for the district of Wisconsin, in a certain cause therein depending and at issue between Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, complainants. and Isaac N. Swain, defendant, as follows:

Jonathan S. Stewart, of Homer, Courtland county, State of New York, aged forty-three years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the complainants, doth depose and say as follows, viz:

First. To the first interrogatory he says, his name is Jonathan S. Stewart; that he was forty-three years old on the 24th day of September last; that he is a mechanic by occupation, and that he resides in Homer, Cortland county, State of New York.

Second. To the second interrogatory he says, that he does not know the parties, complainants in the title of these interrogatories named, or either of them, but that he does know the defendant, Isaac N. Swain, and has known him since about the month of May, in the year 1856.

Third. To the third interrogatory he says, that he formerly resided at Watervliet, in the State of Michigan; that he went there to
175 reside on the 5th of June, in the year 1855, and resided there until December, 1857; and while there, from June, 1855, until some time in December of the year 1857, he was connected in business with John W. Medbury and James F. Aldrich, and the firm name was Medbury, Aldrich, and Stewart, and the business of the firm was lumber business; and during a portion of the same period he was connected, also, in business with John W. Medbury, James F. Aldrich, and Marvin A. Dailey, and the firm name was Dailey, Aldrich, and Company, and the business of the firm was mercantile business.

Fourth. To the fourth interrogatory he says, that he is acquainted with the lands formerly owned by Medbury and Aldrich, and purchased by them from the defendant, situated at and near Watervliet, State of Michigan; that the said Medbury & Aldrich made certain improvements on said lands, to wit: that the under timbers in the old mill were taken out, and new ones put in, and a new wheel of large size and gearing was put in, and a new gang of large size. These improvements were made in the summer and fall of the year 1855, and at a cost of from two thousand to two thousand five hundred dollars; that there were additional improvements also made on said lands by said Medbury and Aldrich in the erection by them of a saw mill, and that the cost of building said saw mill, including the cost of the improvements made by them on the old mill, amounted to the sum of $33,000 at the time when they got the saw mill completed and in running order, which was in the spring of 1856; that one
176 Martin Ruggles made or built the foundation upon which said saw mill was erected by driving the piles therefor in the fall of 1854, and that the foundation of the saw mill was thus commenced, and that nothing further toward building the mill was

done until April, 1855, when a bill for the materials to be used in the building of the mill was made out by him, the said Stewart, for the said Medbury and Aldrich, and on the 5th day of June, 1855, he, the said Stewart, took upon himself the charge of superintending the building of said saw mill.

Fifth. To the fifth interrogatory he says, that he had charge of the business of Medbury and Aldrich at Watervliet, Michigan, in connection with the business of the saw mill as erected by Medbury and Aldrich, and that he is familiar with the construction and dimensions of said saw mill as built by Medbury & Aldrich, and was present pretty much all of the time during the building of said saw mill; that the dimensions of said saw mill, as built by Medbury and Aldrich, including those parts not under cover, were 78 feet by 100 feet; that the dimensions of that part of said mill under cover were 60 feet by 78 feet, and that part not under cover 40 feet by 78 feet, and the name by which that part of said mill not under is called or known is, platforms for lumber, and is used for the purpose of depositing lumber on in the night, and to raft from; that the room, or that part of said mill used for edging lumber, was situated down stream from the ship gang and slabbing gang, and the dimensions thereof were about 18 feet by 40 feet, and the same was
177 under cover; that he has previously included in his statement of the dimensions of said mill the dimensions of that part of said mill used for edging lumber.

Sixth. To the sixth interrogatory he says, he has had experience in the lumber business, and in building of saw mills; that in the year 1848 he assisted in erecting a saw mill in Steuben county, State of New York, which would saw 30,000 feet of lumber per day, and had the charge of running the same from the month of February, 1849, to the spring of the year 1855, with the exception of one year of that time.

Seventh. To the seventh interrogatory he says, that in his opinion, the platform connected with the saw mill, as built by Medbury and Aldrich, was a necessary and indispensable part of said mill; and that his reasons therefor are, first, the mill stood in the stream, on the south side of which was a high bluff, and it was necessary to have a place to store the lumber on, in order to raft the same down stream, especially in the night time, as it could not then be rafted, it being almost the uniform practice to run the mill night and day; second, from the quantity of lumber daily sawed by the mill, the platform was indispensibly necessary to store it on, as there would frequently accumulate in both stories of the platform from 50,000 to 100,000 feet of lumber before the same could be removed by any reasonable effort.

Eighth. To the eighth interrogatory he says, that the value of the saw mill, as built by Medbury and Aldrich, was $33,000,
178 including the sum spent by them on the old mill, which was from $2,000 to $2,500; that the value of a saw mill of the dimensions of fifty by one hundred and fifty feet, built upon the same premises upon which the mill of Medbury and Aldrich was

built, and upon the foundation built in the fall of 1854, up and down stream, would have been about $16,000; that the mill built by Medbury and Aldrich would have been far the more valuable than the other, for the reason that the one built by Medbury and Aldrich, with the complement of hands necessary to run the same, would saw about 70,000 feet of lumber per day; whereas a saw mill built of the dimensions of 50 by 150 feet upon the foundation built in the fall of 1854, up and down stream, would saw about 35,000 feet per day; but the latter would be of less expense for labor in running the same, to wit: in the proportion of 2-5ths.

Ninth. To the ninth interrogatory he says, that, in his opinion, a first-class gang mill could not have been built upon the premises aforesaid, of the dimensions of fifty by one hundred and fifty feet, for the following reasons, to wit: the wheels would have had to have been placed down stream in such a manner that they would have materially interfered with each other; in fact, to such an extent, that not more than one-half of the lumber could have been manufactured per day that might be manufactured in a mill constructed of the dimensions of 78 by 100 feet upon the premises aforesaid;
179 that but two gangs of saws could work to advantage in a saw mill of the dimensions of 50 by 150 feet; that three gangs of saws were contained and used in the mill as built by Medbury and Aldrich.

Tenth. To the tenth interrogatory he says, that, in his opinion, the value of a saw mill built upon the same premises as the saw mill erected by Medbury and Aldrich, of the dimensions of fifty by one hundred and fifty feet, as compared with the mill erected by Medbury and Aldrich, would be about one-half, for the reason that, with all the labor employed therein to run it to its greatest extent, it would not turn out but about one-half the quantity of lumber that the mill erected by Medbury and Aldrich would, and the expense of the labor employed in the latter would be but about two-fifths more than the former.

Eleventh. To the eleventh interrogatory he says, that, in his opinion, a saw mill of the dimensions of 50 by 150 feet, built and erected upon the same premises as the said mill of Medbury & Aldrich, and upon the foundation commenced in the fall of 1854, would not have admitted of any better railway facilities for passing logs and lumber through the length of the mill, from saw carriage to saw carriage, and thence, when manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by Medbury and Aldrich; and the reasons he assigns for his opinion are: first, that for about seven-eighths of the year, during which time the river is usually open, the railway for passing lumber, when manufactured, into the lumber yard for market is not used, for the
180 reason that it is much less expensive to transport it by water, and the expense of the labor for passing the manufactured lumber out of the mill on to the platform ready for loading it into boats, or into rafts, would not be more than one-third what it would be to pass it from the mill to the piling ground for a market by land transportation.

Thirteenth. To the thirteenth interrogatory he says, that in his opinion, the saw mill as built by Medbury and Aldrich was well and properly built.

Fourteenth. To the fourteenth interrogatory he says, that the causes or reasons for the building of the saw mill, as erected by Medbury and Aldrich from one of the dimensions of fifty by one hundred and fifty feet, were to make it a saw mill capable of turning out more manufactured lumber, at a far less expense in proportion to the quantity so manufactured than the expense of the same would have been in a mill of the dimensions of 50 by 150 feet upon the foundation commenced in the fall of 1854; but whether such change was known or made known to the said defendant, Isaac N. Swain, before the erection of said saw mill was completed, he cannot say.

Fifteenth. To the fifteenth interrogatory he says, he was not present at the saw mill of Medbury and Aldrich, and during the erection, at any interview between John W. Medbury and the said defendant, in regard to the change in the dimensions of said mill; that he cannot therefore give any further answer to the inquiries made of him in this interrogatory.

Sixteenth. To the sixteenth interrogatory he says, that he
181 cannot say whether the defendant was present at and during the erection of the said mill of Medbury and Aldrich, at Watervliet, Michigan, or not, as he has no recollection of seeing him there until after the completion of the mill.

Seventeenth. To the seventeenth interrogatory he says, that Medbury and Aldrich caused their said saw mill, erected by them at Watervliet in the years 1855 and 1856, to be insured, and that he acted as their agent in procuring the insurance. That on or about the 30th day of May, 1856, acting as the agent of the said Medbury and Aldrich, he procured from one E. M. Plympton, an insurance agent, then residing at Niles, in the State of Michigan, three policies of insurance for the said Medbury and Aldrich, on their said mill, of $2,000 each; one of the policies was issued by the Ætna Company, Hartford, Connecticut; one by the Washington Union Insurance Company, and the other, by the Jackson Mutual Insurance Company of Jackson, Michigan.

Eighteenth. To the eighteenth interrogatory he says, that the three policies of insurance procured by him, as set forth in his answer to the 17th interrogatory, were sent by him to James F. Aldrich, who was then residing in Chicago, and that according to his best recollections, were mailed by him at Niles, to the address of the said Aldrich, at Chicago, on the same day they were procured by him, and whether the said policies of insurance were assigned or not, he does not know.

182 Nineteenth. To the nineteenth interrogatory he says, that in the forepart of the month of May, 1856, but on what particular day of that month he does not now recollect, he, together with the above-named John W. Medbury, the defendant, Isaac N. Swain, and Henry A. Miller, the machinist who put in the machinery into the saw mill for Medbury and Aldrich, were present at the said

saw mill, and that they each and all of them went in and around and through every part of said mill and inspected and examined the timbers, machinery, gearing, platforms, and every part of the building which was then very nearly and almost entirely completed, a portion of it having previously been completed and put in running order. and as the inspection of it was so being made by the said parties. The attention of the said Swain was called by the said Medbury to the change of the size of the dimensions of the mill from 50 feet by 150 feet to that of 78 by 100 feet, and the reasons assigned by Medbury why it was made and the necessity for such change, and the said Miller also explained and pointed out to said Swain, while the inspection of the gearing and machinery was thus being made, the benefits that would result from, and the necessity of the change and the advantages that would result from the change; and after the inspection and examination had been gone through with, and the explanations given, and the reasons assigned for the changes thus made in the erection of the mill; the said Swain was asked by the said Medbury if he was satisfied with the change
183 had been made, and was willing to consent thereto;
said Swain replied that he was, and that he, the said
did not hear the said Swain make the least objection then
that he has no recollection of hearing the said Swain, at that time, make any objection to the condition in which the shop of his mutual brother was left in, or to the location upon which it had been placed.

First. To the first cross-interrogatory he says, that he was for a certain period, to wit, from the 5th day of June, 1855, to the latter part of December, in the year 1857, interested in a portion of the business of Medbury and Aldrich, at Watervliet, in the state of Michigan, and that the business in which he was so interested with them, was in the manufacture of lumber, the said Medbury and Aldrich being the owners of a saw mill at Watervliet, which he, the said Stewart, had the charge and management of, and in which the three were in partnership in the stocking thereof with lumber, and in the manufacture and sale of lumber, under the firm of Medbury, Aldrich, and Stewart, and that he was also interested in mercantile business with the said Medbury and Aldrich, and one Marvin A. Dailey, at Watervliet aforesaid, for the term of about one year, commencing on the 5th day of June, 1855, and that there was a written agreement between the said Medbury, Aldrich, and Stewart, as to the interest of each in their lumber business, and the terms of their
184 copartnership in relation thereto, executed by them respectively on the day of the date thereof, June 5th, 1855, and which said agreement also contains the terms and conditions of the agreement in relation to the mercantile business made between the said Medbury, Aldrich, and Stewart, in which the said Dailey was interested with them, but the said agreement was never signed by the said Dailey; that the said written agreement is now in the possession of the said Stewart, and that a true copy thereof is annexed hereto to his deposition, marked "exhibit A."

Thirteenth. To the thirteenth interrogatory he says, that in his opinion, the saw mill as built by Medbury and Aldrich was well and properly built.

Fourteenth. To the fourteenth interrogatory he says, that the causes or reasons for the building of the saw mill, as erected by Medbury and Aldrich from one of the dimensions of fifty by one hundred and fifty feet, were to make it a saw mill capable of turning out more manufactured lumber, at a far less expense in proportion to the quantity so manufactured than the expense of the same would have been in a mill of the dimensions of 50 by 150 feet upon the foundation commenced in the fall of 1854; but whether such change was known or made known to the said defendant, Isaac N. Swain, before the erection of said saw mill was completed, he cannot say.

Fifteenth. To the fifteenth interrogatory he says, he was not present at the saw mill of Medbury and Aldrich, and during the erection, at any interview between John W. Medbury and the said defendant, in regard to the change in the dimensions of said mill; that he cannot therefore give any further answer to the inquiries made of him in this interrogatory.

Sixteenth. To the sixteenth interrogatory he says, that he
181 cannot say whether the defendant was present at and during the erection of the said mill of Medbury and Aldrich, at Watervliet, Michigan, or not, as he has no recollection of seeing him there until after the completion of the mill.

Seventeenth. To the seventeenth interrogatory he says, that Medbury and Aldrich caused their said saw mill, erected by them at Watervliet in the years 1855 and 1856, to be insured, and that he acted as their agent in procuring the insurance. That on or about the 30th day of May, 1856, acting as the agent of the said Medbury and Aldrich, he procured from one E. M. Plympton, an insurance agent, then residing at Niles, in the State of Michigan, three policies of insurance for the said Medbury and Aldrich, on their said mill, of $2,000 each; one of the policies was issued by the Ætna Company, Hartford, Connecticut; one by the Washington Union Insurance Company, and the other, by the Jackson Mutual Insurance Company of Jackson, Michigan.

Eighteenth. To the eighteenth interrogatory he says, that the three policies of insurance procured by him, as set forth in his answer to the 17th interrogatory, were sent by him to James F. Aldrich, who was then residing in Chicago, and that according to his best recollections, were mailed by him at Niles, to the address of the said Aldrich, at Chicago, on the same day they were procured by him, and whether the said policies of insurance were assigned or not, he does not know.

182 Nineteenth. To the nineteenth interrogatory he says, that in the forepart of the month of May, 1856, but on what particular day of that month he does not now recollect, he, together with the above-named John W. Medbury, the defendant, Isaac N. Swain, and Henry A. Miller, the machinist who put in the machinery into the saw mill for Medbury and Aldrich, were present at the said

saw mill, and that they each and all of them went in and around and through every part of said mill and inspected and examined the timbers, machinery, gearing, platforms, and every part of the building which was then very nearly and almost entirely completed, a portion of it having previously been completed and put in running order, and as the inspection of it was so being made by the said parties. The attention of the said Swain was called by the said Medbury to the change of the size of the dimensions of the mill from 50 feet by 150 feet to that of 78 by 100 feet, and the reasons assigned by Medbury why it was made and the necessity for such change, and the said Miller also explained and pointed out to said Swain, while the inspection of the gearing and machinery was thus being made, the benefits that would result from, and the necessity of the change and the advantages that would result from the change; and after the inspection and examination had been gone through with, and the explanations given, and the reasons assigned for the changes thus made in the erection of the mill; the said Swain was asked by the said Medbury if he was satisfied with the change that
183 had been made, and was willing to consent thereto; and that said Swain replied that he was, and that he, the said Stewart, did not hear the said Swain make the least objection thereto, and that he has no recollection of hearing the said Swain, at that time, make any objection to the condition in which the shop of his mute brother was left in, or to the location upon which it had been placed.

First. To the first cross-interrogatory he says, that he was for a certain period, to wit, from the 5th day of June, 1855, to the latter part of December, in the year 1857, interested in a portion of the business of Medbury and Aldrich, at Watervliet, in the state of Michigan, and that the business in which he was so interested with them, was in the manufacture of lumber, the said Medbury and Aldrich being the owners of a saw mill at Watervliet, which he, the said Stewart, had the charge and management of, and in which the three were in partnership in the stocking thereof with lumber, and in the manufacture and sale of lumber, under the firm of Medbury, Aldrich, and Stewart, and that he was also interested in mercantile business with the said Medbury and Aldrich, and one Marvin A. Dailey, at Watervliet aforesaid, for the term of about one year, commencing on the 5th day of June, 1855, and that there was a written agreement between the said Medbury, Aldrich, and Stewart, as to the interest of each in their lumber business, and the terms of their
184 copartnership in relation thereto, executed by them respectively on the day of the date thereof, June 5th, 1855, and which said agreement also contains the terms and conditions of the agreement in relation to the mercantile business made between the said Medbury, Aldrich, and Stewart, in which the said Dailey was interested with them, but the said agreement was never signed by the said Dailey; that the said written agreement is now in the possession of the said Stewart, and that a true copy thereof is annexed hereto to his deposition, marked "exhibit A."

Second. To the second cross-interrogatory he says, that in the month of April, 1855, he went to Watervliet, Michigan, and was introduced to John W. Medbury, and at his request made out for him and James F. Aldrich a bill of the lumber and machinery for the saw mill which they had commenced building, and on the 5th day of June following, he commenced work for them, in the repairing by them, and rebuilding their old mill, and also in the building and erecting a new saw mill; the two mills when completed, to comprise or constitute one entire establishment, in the title to which he had no interest then, and never has had at any time since, but in the use of the same when completed, was to be interested with them in the manufacture of lumber as a partner, for the term of three years from the 5th day of June, 1855.

Third. To the third cross-interrogatory he says, that when he first went to work at Watervliet, on the 5th of June, 1855, (the
185 making out of the bill of lumber and machinery for Medbury and Alrich, in the month of April previous, by him, not being considered by him as work, as it was done gratuitously and as a matter of favor,) about 60 piles for the foundation had been driven, of which 50 had been driven in the fall of 1854, by one Martin Ruggles, and that about one-eighth of the lumber and timber for the whole work had been cut and prepared ready for framing when he, Stewart, commenced work for Medbury and Aldrich.

Fourth. To the fourth cross-interrogatory he says, that in the month of April, 1855, the original plan of the saw mill was changed. That there had been no work done on the foundations that spring, prior to the change in the plan of the mill; Martin Ruggles drove the most of the piles for the foundations of the mill in the spring of 1855, that were driven that spring, a few were driven by Medbury and Aldrich's hands whom I superintended. That there was a written contract, as he understood, between Medbury, Aldrich, and Ruggles, made in the fall of 1854, whereby Ruggles agreed with Medbury and Aldrich to drive the piles at a specific price for each, and Ruggles was paid by Medbury and Aldrich agreeably to the contract for the number he did drive.

Fifth. To the fifth cross-interrogatory he says, that there was an old saw mill standing on the south side of Mill Creek race; it was not torn down to make way for a saw mill to be built 50 by one hun-
dred and fifty feet, but in order to have built a saw mill 50 by
186 150 feet, upon the piles driven for the foundation in the fall of 1854, that old saw mill should have been removed in order to have made room for assorting and turning the logs before going to the different gangs. That the old saw mill was removed by Medbury and Aldrich, he, the said Stewart, having the charge and superintendance of their workmen during the removal.

Sixth. To the sixth cross-interrogatory he says, there was also standing upon the same side of said Mill Creek race a shop of about the size of 20 feet by 20 feet, one story high, but that he never saw it used or occupied by a deaf and dumb brother of the defendant; and that said shop was originally supplied with water by passing

the same through a trunk from a point below the said old saw mill; that the said shop was never used or occupied by any one while he, the said Stewart, was in Watervliet; and that the trunk by which it was intended originally to be suppled with water was so far out of repair as to be useless.

Seventh. To the seventh cross-interrogatory he says, that he has not stated that the defendant was present, at, & during the erection of said saw mill of Medbury and Aldrich, at Watervleit, Michigan, and cannot, therefore, give any further answer to this cross-interrogatory.

Eighth. To the eighth cross-interrogatory he says, that the defendant was not, to his knowledge & recollection, present, or around, or about the saw mill being built by Medbury and Aldrich, at any time after the change in the plan of the saw mill was made,
187 and before it was completed.

Ninth. To the ninth cross-interrogatory he says, that the change in the shape and size of the saw mill building was suggested by the impossibility of putting in the machinery & wheels suitable and necessary for a saw mill with a ship gang, stabbing gang, stock gang, jack wheels, & lath works, when the dimensions of the mill were but 50 by 150 feet. That the saw mill building was erected & completed in pursuance of a change from the original plan. That the following is a statement of the particulars of the change, to wit, that the length of the mill, up and down the stream, east & west, was reduced from 150 feet to 100 feet, and the width of the mill, north & south, was increased from 50 to 78 feet.

Tenth. To the tenth cross-interrogatory he says, that Medbury and Aldrich never did, at any time, to his knowledge, construct or build a saw mill 50 by 150 feet upon the foundation commenced by driving piles in the fall of 1854, at Watervleit, Michigan.

Eleventh. To the eleventh cross-interrogatory he says, that the saw mill is not fifty feet either way, or 150 feet either way. That the saw mill building erected by Medbury and Aldrich at Watervleit is something other than anything more or less than sixty feet square that it is a building 78 feet by 100 feet in dimensions.

Twelfth. To the twelfth cross-interrogatory he says, that it is not common for all saw mills to have attached to them outside platforms, log-ways, railways, slides, flumes, and booms, for some saw
188 mills are so situated by their surroundings that where they are possessed of all these conveniencies they cannot be attached outside, but must necessarily be placed within the building, and the size of the saw mill building would, therefore, depend upon how many of them it became necessary to place within the building, and the size of these conveniencies, when placed within the building, would, to some extent, depend upon the quantity of manufactured lumber it was intended the mill should be able to turn out in a specified time. The platform referred to in the seventh interrogatory is a part of the plan of the original saw mill building, and is a more necessary and indispensible part of said saw mill than the log-way, the railway, the slides, and booms; as the to log-way, the railway, and

slides, that he does not call either of them, except the slides for jacking in logs, any part of the saw mill building proper. That the saw mill built by Medbury and Aldrich, at Watervleit, Michigan, did have a platform attached outside, also flumes and booms. It had slides also, which were partly inside & partly outside of the building.

Thirteenth. To the thirteenth cross-interrogatory he says, that the saw mill which was built by Medbury and Aldrich. at Watervliet, Michigan, was properly built and completed, and on a safe, firm and secure foundation.

Fourteenth. To the fourteenth cross-interrogatory he says, that the bulkhead in front of said saw mill, no part of the bulkhead being under the mill, was not safe and secure, in consequence of its
189 being over a place a part of which was filled with flood wood covered by sand; and the piles for the foundation of said saw mill were well and securely driven, but the piles for the bulkhead, although originally well driven, subsequently proved to be insecure in consequence of that underwood and sand, through or into which they had been driven.

Fifteenth. To the fifteenth cross-interrogatory he says, that from 10 to 15 feet of the sheet piling of the bulkhead gave way soon after the head of water was raised, and the northeast corner of the saw mill settled a trifle on account of their giving away

Sixteenth. To the sixteenth cross-interrogatory he says, that said bulkhead was not constantly and frequently getting out of repair, that it never got out of repair but once.

Seventeenth. To the seventeenth cross-interrogatory he says, that he has not answered the fourteenth interrogatory by saying that the change of the saw mill from 50 by 150 feet, to the one that was built by Medbury & Aldrich, was known by or made known to the defendant till after it was completed, he has no further answer to make to this interrogatory.

Eighteenth. To the eighteenth cross-interrogatory he says, that the defendant, according to his, the said Stewart's, best knowledge, first knew of the change in said saw mill in the year 1856, and in the latter part of April or fore part of May, in that year, but in
190 which of those months, or on what day of the month he does not now recollect.

Nineteenth. To the nineteenth cross-interrogatory he says, that the shop building on the said premises, referred to in said cross-interrogatory, was removed to make room for the building of the saw mill that was built by Medbury and Aldrich, at Watervleit, and such removal was necessary for the building of the saw mill that they built, and it was removed only so far as to be reasonably out of the way of constructing said saw mill, but its condition after its removal was not left such that the deaf and dumb brother of the defendant could have used and occupied it, or any one else, without its having been repaired up, and after it had been repaired up, the deaf and dumb brother of the defendant could have had the same use, occupancy, & privilege of said water power, and of good, free, and easy ingress and egress to & from it, as he had before the shop was removed by Medbury & Aldrich.

Twentieth. To the twentieth cross-interrogatory he says, that said shop, to his knowledge, has never been put in any shape so that the mute brother of the defendant could use and occupy it at all for any purpose. That the said mute brother did not by signs complain of the destruction of his shop, that is, the moving of it and leaving it in the manner above stated.

Twenty-first. To the twenty-first cross-interrogatory he says, that he has heard Medbery speak about the shop of the said deaf and dumb brother, and the water power connected with it, but
191 has no recollection of ever hearing Aldrich say anything about it. That he had had conversation with Medbury in relation to the said shop, & the water privileges thereto belonging, and that Medbury, in that conversation, informed him that he had a written agreement with the defendant, giving him the right and privilege of removing the said shop in case the improvements he was intending to make in the erection of the new mill by him & Aldrich rendered the same necessary, the shop to have water privileges after its removal to the same extent as before its removal, as long as said mute brother chose to occupy it, & that it is his impression that Medbury, or the defendant, on a certain time afterwards exhibited to him that written agreement or a copy of it. That Medbury at the time of the conversation last above-mentioned, also stated that the defendant, by the terms of the said written agreement was to be at the expense of putting the shop in order & repair after its removal for his mute brother's use, & that the privileges of the water for the same, for its use was ready for him whenever he chose to put a trunk into the flume to conduct the water to the shop, which would be a distance of about seventy feet, the expense of which he said the said defendant had assumed to be at, & also to see that the repairs necessary to put the shop in order were made.

192 Twenty second. To the twenty-second cross-interrogatory he says, as he has already, in his answer to the twenty-first cross-interrogatory, stated he never, to his recollection, heard Aldrich say anything about the shop after its removal, but, that Medbury, in a conversation with him informed him, that by a written agreement entered into between Medbury and Aldrich, and the defendant, the defendant had contracted with them to put the shop in order at his own expense after its removal, and that at the time of its removal from its former location, it was moved on to the place designated & agreed upon between the said Medbury and the defendant's mute brother.

Twenty-third. To the twenty-third cross-interrogatory he says, that the manner in which said shop was removed, was upon timbers and rollers, and that it was left on cross timbers. & the foundations of said shop, on which it rested before its removal, were left under the shop on the place to which it had been removed. That the shop, as it was left, was not in a condition to be used for any purpose other than a store-room.

Twenty-fourth. To the twenty-fourth cross-interrogatory, he says, that Medbury and Aldrich, never to his knowledge, procured insur-

ance policies upon a mill, fifty by one hundred and fifty feet, built at Watervleit, Michigan, upon foundations made by driving piles in the fall of 1854.

Twenty-fifth. To the twenty-fifth cross-interrogatory he says, that he does, of his own knowledge, know that policies of insurance upon the saw-mill built by the said Medbury and Aldrich, in Watervleit, Michi-
gan, to the amount of six thousand dollars, were obtained on or
193 about the 30th day of May, 1856; that there were three policies of $2,000 each; one of the policies was issued by the Ætna company, Hartford, Connecticut; one by the Washington Union Insurance Company, and the other by the Jackson Mutual Insurance Company of Jackson, Michigan; the numbers & the dates of the policies he cannot state, as he has mislaid the memorandum or letter containing the same, and, as he has stated in his answer above set forth for the eighteenth interrogatory, he procured the policies to be issued by one E. M. Plympton, an agent of the said insurance companies, residing at Niles, in the State of Michigan, and that the policies, after he had obtained them, were forwarded by him to Chicago, to James F. Aldrich, but that he may have labored under a misrecollection in stating, as he did, in his answer above to the 17th interrogatory, that the policies were in the name of Medbury and Aldrich alone. They may have been in the name of Medbury, Aldrich, and Stewart.

J. S. STEWART.

Examination taken, reduced to writing, and by the witness subscribed and swown to, this 2d day of August, 1864, before me.

EDWARD C. REED,
Commissioner.

194 "*Exhibit A.*"—*Copy of article of agreement of co-partnership.*

Articles of co-partnership made and entered into, the fifth day of June, A. D. 1855, between John W. Medbury, of the city of Milwaukee, in the State of Wisconsin, James F. Aldrich, of the city of Chicago & State of Illinois, and Jonathan S. Stewart, late from the State of New York, witness:

That the said parties have formed, and do hereby form a co-partnership in the business of manufacturing lumber at the mills and works owned by said Medbury & Aldrich, at Watervleit, in the county of Berrien, and State of Michigan, for the period of three years from the date of these presents, on the terms & conditions following, that is to say:

Said Medbury & Aldrich, the owners, are now engaged in repairing & rebuilding the old mill on their said premises, & also in building and erecting an entire new saw mill at the same place on an adjoining site; both fed by the same water-power, taken from Paw Paw river. In the old mill is to be put and placed a gang of new saws; in the new mill three gangs of new saws. The two mills, when completed, will comprise or constitute one entire establishment, with four gangs

of saws—two muley saws, beside lath works, and two edging saws. All of which said owners agree to proceed with and complete at their own expense within the current year; and the said mills, with all their privileges, water power, and necessary appurtenances & machineries, fixtures and implements of business connected
195 therewith, including the present available use of the mill now in process of repairing & rebuilding, not yet stopped, will be and is for the use of the partnership company or firm hereby created, for the whole period of three years contemplated and provided for by this contract. The said Jonathan S. Stewart agrees, on his part, to remove his family immediately to Watervleit, & assume and take upon him the entire superintendance and oversight of the whole business of manufacturing lumber at said mills, together with the charge and oversight of said repairs and rebuilding of mills and machineries, in which latter business, however, he is to act only as agent for said Medbury & Aldrich, the owners, and when said mills and machineries are completed, he is to proceed and superintend & manage the whole business as the resident partner, the said other partners not being expected to devote any of their time or services thereto, except so far as their own choice & convenience may incline them, for the purpose of keeping up an understanding or familiarity with the progress of the business; to which said business, for the period aforesaid, the said Stewart agrees with his co-partners, that he will faithfully devote all of his time, talents and energies, including therein such attention to the store business hereinafter specified, as the interest of all the parties may seem to require, and the lumber business may consistently allow. It is also understood and agreed that from the proceeds of the lumber business, the said company or partnership firm hereby formed shall allow and pay to Med-
196 bury and Aldrich, as owners of the real estate and mills and machinery aforesaid, for the fair rent, use, and occupation thereof during said time, in lieu of an annual rent, the sum of one dollar and fifty cents per thousand for every thousand feet of lumber manufactured during the whole time, payable at stated periods as the business progresses; accounts whereof shall be kept, and an estimate made every month of the term, and all accounts entered on the company books, which said Stewart shall keep open at all times to the inspection of the parties, and this compensation or rent, as in other cases where rent is payable by a company to a third person or stranger, will be entered and kept in account as one of the expenses incident to the manufacturing business aforesaid, in like manner, as another incidental expense of the business. It is understood & agreed that, from the proceeds of the same business, the said Stewart shall also be entitled to & shall draw an annual salary of five hundred dollars per year for every year of said term, as & for his compensation for all the services required of him under & by this contract, (except only the privilege personal to him of a house and lot for residence, as hereinafter provided, with his family.) It is further agreed in like manner, that after said Medbury & Aldrich shall, at their own charges and expense as aforesaid, have furnished

& completed said mills and machinery, including rebuilding and present repairs connected therewith, the present hereby
197 formed company shall insure & keep insured said mills & machineries at their joint costs & charges, & thereafter shall keep the same at all times for said term in as good repair as when completed, excepting ordinary wear & tear, ruins taking & repairing from time to time, as good profit & present use may require; and rebuiling & restoring in case of loss or damage and destuction by fire. It is further agreed, on the part of said Stewart, that he will advance and furnish, as cash, fifteen hundred dollars, to be used as capital in the business of stocking and furnishing the mills with logs to be manufactured into lumber, and the necessary expenses of carrying on said business, which amount shall be entered to his credit in account of capital stock, and the same is to be restored to him before an account of profit or loss can be reached in the final closing up of the business.

The stock on hand, logs, boards, &c., is to be taken into account by the new firm, an inventory to be made thereof immediately, & entereded to the credit of said Medbury & Aldrich. The said Stewart is also, additional to his salary aforesaid, to be furnished, free of rent for said term, with a house and lot owned by the said Medbury and Aldrich, for himself and family to live in, that is to say, the Swain house & lot recently occupied by Isaac N. Swain, a former owner, the lot being four rods in front on Maine street, and extending back to the bluff.

It is also understood that the firm of Dailey, Aldrich, & Co.,
198 consisting of Marvin A. Daily, & the said Medbury & Aldrich, are at said Watervleit jointly interested in carrying on a store, and dealing in dry goods, groceries, &c., as in country store generally, independant of, and separate from the aforesaid lumber business; said Dailey, Medbury & Aldrich, being equally interested, share and share alike, into which said store company, said Stewart will also hereby be admitted, and from this date, with said Dailey's consent, subscribed or endorsed hereto or hereon; said Dailey will continue to receive & be entitled to his equal third intererst as heretofore, but said Medbury & Aldrich, together with said Stewart, will hereafter share the remaining two-thirds interest equally between the three, share and share alike, the same as in the lumber business.

The rent of the store to Medbury and Aldrich, as owners, due from and payable to the new company, will be four hundred and fifty dollars per annum, payable as heretofore, the owners reserving to themselves the upper rooms for sleeping apartments.

And the said co-partners, Medbury, Aldrich & Stewart, are to have and share each one equal third part of all the clear profits of said lumber business, after payment of expenses thereof, restitution of capital, &c., &c. The sale of lumber manufactured at said mills has heretofore been to said Jas. F. Aldrich, who is engaged in selling at his lumber yard in Chicago, which lumber he has received at the mills aforesaid at stated prices, and the same will proceed in like manner until the parties shall otherwise arrange or agree. Said three
199 several undersigned parties also hereby agree to bear equally

all losses incident to the business aforesaid. Said Stewart will be entitled to employ and pay from said business all such laborers, clerks, and other agents, as the due and profitable prosecution of the same may judiciously and economically require; said Daily continuing the management of the store as heretofore, with such aid from said Stewart as he may wish and find time to render. Furthermore, the estimate of rent or use of mills, per thousand feet of one dollar fifty cents, payable to the owners as aforesaid, is not intended to apply to lath manufactured at said mills, but the compensation to which the owners shall be entitled on lath manufactured shall be the sum of fifty cents only to the thousand feet, making three thousand feet of lath equal to one thousand of other lumber. And whereas, the parties aforesaid contemplate and estimate that said mills, when completed, can, and should profitably turn out and produce annually, each year, ten millions of feet of sawed lumber; it is, therefore, agreed, that in case it shall become necessary so to do, in consequence of an inadequate supply of logs from other sources, then the said company, hereby formed, shall, and may proceed, as a part of their business, to obtain logs, sufficient in number and quantity to make up the deficiency for any current year from the timbered lands of said Medbury and Aldrich, in the vicinity of the mills, to be taken at such locations as said Medbury & Aldrich may designate from time to time, and for which allowance and payment shall be made, from the manufacturing company afore-
200 said, to said Medbury & Aldrich, the owners, as aforesaid, at such rates and prices as shall equal, from time to time, the fair average prices in the same market of logs of the same description obtained from other sources; but said Medbury & Aldrich shall not be held in any case to supply for a deficiency to exceed two millions of feet each year.

For convenience of all parties, it is agreed that the old mill, now in process of repairing, shall go on, as now, for account of the present owners and stuff for the new mill, said Stewart devoting most of his time, ad interim, to the store, until about two or three weeks hence, when it is contemplated the owners may get the yard cleared up, and the said mill be in readiness to receive the new gang of saws, when said Stewart can go into full possession and commence sawing on account of the new partnership. The goods in store will require inventorying. Should the dam, races, or other permanent portion of the water privileges and conveniences appurtenant thereto need repairs, in progress of the business, by injuries or accident, or wear, occurring hereafter, the repair and keeping up of same is to be done at the joint expense of the partners.

Nevertheless, it is agreed that if there are obvious alterations in the nature of permanent improvements to the premises, and power to be made which will materially advance the value and availability of the same, said Stewart is at liberty to do and execute the same at the expense of owners, not to exceed one hundred dollars;
201 beyond that sum on joint account as to excess. The salary and emoluments of said Stewart are to run from the date of these presents.

Witness the hands and seals of the parties, and of said M. A. Dailey, to show his assent thereto.

In case of protracted sickness, or inability of said Stewart to perform, on his part, he is to be at liberty to perform, for time being, by an adequate and competent substitute, hired at his own expense, everything else continuing as before; the style of the new firm to be Medbury, Aldrich & Stewart.

Witness hands and seals as before stated.

[L. S.] JOHN W. MEDBURY.
[L. S.] JAS. F. ALDRICH.
[L. S.] J. S. STEWART.
[L. S.]

J. S. Stewart.

At the execution of the commission for the examination of Jonathan S. Stewart, a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, a paper writing was produced by him, the said Jonathan S. Stewart, and by him deposed unto as being a genuine instrument, and also that the foregoing copy of agreement is a true and correct copy of said agreement, or paper writing, so produced by him.

EDWARD C. REED,
Commissioner.

The complainants further, to maintain the issue on their part, offered and read in evidence the deposition of John W. Medbury, as follows, to wit:

202 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

The President of the United States of America to J. H. Skidmore, esq., greeting:

[SEAL.] Know ye, That in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine John W. Medbury, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, & Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part of the complainants, upon the interrogatories annexed to the commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said John W. Medbury to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit

court of the United States, before the judge thereof, with all convenient speed.

Witness, the Honorable James M. Wayne, first associate justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this seventeenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

203 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify, that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcript therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 17th day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

204 Interrogatories to be administered to John W. Medbury, of Little Rock, Arkansas, to be produced, sworn, and examined under, and by virtue of the annexed commission, before J. H. Skidmore, esq., residing at Little Rock, State of Arkansas, in a certain cause now pending and at issue in the circuit court of the United States for the 9th circuit and district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part and behalf of the complainants.

First interrogatory. What is your name, age, occupation, and where do you at present reside?

Second interrogatory. Do you know the parties, complainants and defendant, in the title of these interrogatories named, or either, and which of them; and how long have you known them, or either or which of them?

Third interrogatory. State whether or not you were formerly connected in business at Watervleit, State of Michigan; if yea, when, during what year, with whom, and in what firm, name or names.

Fourth interrogatory. State whether or not you are familiar and acquainted with the saw mill at Wavervleit, Michigan, built by Medbury & Aldrich; if yea, state when the building of said mill was commenced, and when completed; what were the dimensions of said mill, who superintended the construction and building of said mill; what was the cost and value of said mill, as built.

Fifth interrogatory. State whether or not the saw mill, as built

by Medbury & Aldrich, at Watervleit, Michigan, was well and properly built. Was said mill built upon the foundation commenced the fall previous to 14th April, 1855?

205 Sixth interrogatory. In the contract for the sale of lands by the defendant to James F. Aldrich and yourself, situated in the counties of Berrien and Van Buren, State of Michigan, bearing date the 28th day of September, 1854, is contained the following paragraph, to wit:

"III. It is agreed and understood by the parties to this agreement, that after the payment of said ten thousand dollars, ($10,000,) then, and within ninety days thereafter, said party of the first part agrees to execute, or cause to be executed, to the parties of the second part, their heirs or assigns, a good and sufficient warranty deed for the said lands above described, and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging; upon and at the same time the said parties of the second part shall execute, to the said party of the first part, good and satisfactory security upon other property, for the amount of six thousand six hundred and sixty-six and $\frac{2}{3}$ dollars, ($6,666\frac{2}{3}$.) and also their bond and mortgage upon the lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging, conditioned to pay to the said party of the first part the said forty thousand dollars, ($40,000,) as above stated, in eight equal annual installments of five thousand dollars ($5,000) each, and interest as above stated, and also for any payment at any time remaining over due and unpaid, the same shall be considered as money loaned, and bearing interest thereon at the rate of ten per cent. per annum, which interest shall also be paid annually." What was the understanding, intent, and purpose of the parties to said contract, in reference to that part of said contract and paragraph III thereof, which is underscored as above; why inserted in said contract, and how was the amount of $6,666\frac{2}{3}$ arrived at? State fully what was said by the said defendant in reference to and the requiring of such other or further security.

Seventh interrogatory. State whether or not the security upon other property, as specified in said contract and paragraph

206 III. thereof, was given by the said parties of the second part to said contract, or either of them; if yea, by whom. What was the value of such security; upon what property, and where situated?

Eighth interrogatory. State whether or not there was any understanding or agreement at any time, between the defendant, James F. Aldrich, and yourself, that other security was to be given upon property other than that conveyed by the defendant to Aldrich and yourself, for the payment of the mortgage executed by Aldrich and yourself to the said defendant.

Ninth interrogatory. If any, what were the causes or reasons for the building of the saw mill as erected by Medbery & Aldrich, from one of the dimensions of fifty by one hundred and fifty feet.

Tenth interrogatory. State whether or not you had, at or about the time the saw mill, as built by Medbery and Aldrich, was completed, a conversation with the said defendant in regard to the change in the dimensions of the mill and the reasons thereof; if yea, when, where, who was present, and what was said by the said defendant? Did the defendant in that interview, make any, and if any, what objection to the change in the plan and dimensions of the saw mill?

Eleventh interrogatory. Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY, *Compl't's Sol'r.*

207 Circuit court of the United States for the 9th circuit and district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

And now comes the said defendant, by Finches, Lynde, and Miller, his solicitors, and objects to the interrogatories numbered 4th, 6th, 8th, 9th, and 10th interrogatories, for the reason that said interrogatories, and each of them, call for testimony that is irrelevant, incompetent, and immaterial, and because the last clause of the 4he interrogatory calls for irrelevant testimony; that the sixth interrogatory seeks to explain the intention of a written instrument, and to the 8th and tenth because they seek to show by parol a change in tho terms of sealed contract.

Said defendant, not waiving his said objections, joins in the said commission, and proposes to the said witness the following cross-interrogatories:

First. Who drove the *the* piles for the foundation of the saw mill built by Medbery & Aldrich at Watervliet?

Second. Did Medbery & Aldrich ever build at Watervliet, Michigan, a saw mill fifty by one hundred and fifty feet, upon foundation commenced by driving piles in the fall of 1855?

Third. What time in the spring of 1856 did the firm of Medbery & Aldrich commence work on the saw mill or the foundation of the saw mill?

Fourth. Did the bulkhead, or any portion, or part of it, give away or go out soon after the saw mill was completed? If yea, at what corner of the mill; and how soon after the water was let on?

208 Fifth. Did you give any directions about driving the piles for the bulkhead? Was you present any of the time when the piles were being driven for the bulkhead? If yea, how much, and what portion of the time?

Sixth. Have you given a warranty deed on the sale of the premises in suit? If yea, to whom?

Seventh. Have you any interest in the event of this suit? Lastly, did you see the defendant at Watervliet, Michigan, in the spring of the year 1856, and after you had commenced work on the mill? Was the defendant present during the building of the mill from the time you commenced work in the spring of 1856, until the mill was completed? When did you conclude to change the size of the mill, and the plan of the mill? At whose request or suggestion was the change made? Where was the defendant when the change was made? When did the defendant first know of the change? State what the change was. State the size of the mill for which Medbery & Aldrich drove the piles for the foundation.

FINCHES, LYNDE & MILLER,
Solicitors for Defendant.

209 Deposition of John W. Medbery, of Little Rock, State of Arkansas, a witness about fifty-eight years of age, taken before J. H. Skidmore, a commissioner duly appointed by the annexed commission issued out of and under the seal of the circuit court of the United States, for the 9th circuit and district of Wisconsin, to be read in evidence on the part of the complainants, on the hearing of an action now pending in said court, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant.

J. H. SKIDMORE,
Commissioner.

And the said John W. Medbery, being produced, sworn, and examined, testified, as follows:

To the first interrogatory, he says, His name is John W. Medbery; his age is fifty-eight years; by occupation a planter, and resides in Little Rock, State of Arkansas.

To the second interrogatory he says, I know all the parties, complainants and defendants, in the title of these interrogatories, and have known them all a number of years.

To the third interrogatory he says, I was formerly connected in business at Watervliet, State of Michigan, during the years 1854, 1855, and 1856, commencing in the fall of the year 1854, with James F. Aldrich and Jonathan S. Stewart, under the firm-name of Medbery Aldrich, and Stewart.

To the fourth interrogatory he says, I am familiar and acquainted with the saw mill at Watervliet, Michigan, built by Medbery & Aldrich; the building of said mill was commenced in the fall of the year 1854, and was completed in the fore part of the summer of the year 1856. The dimensions of said mill were seventy-eight feet by one hundred feet, including platform. The dimensions of that
210 part of the mill under cover, exclusive of edging room, were sixty by seventy-eight feet. The edging room was about eighteen by twenty-eight feet. The construction and building of said mill was superintended by H. A. Miller, assisted by Jonathan S. Stewart The cost and value of said mill as built was about thirty thousand dollars.

To the fifth interrogatory he says, The saw mill, as built by Medbery & Aldrich at Watervliet, Michigan, was well and properly built. Said mill was built upon the foundation commenced the fall previous to 14 of April, 1855.

To the sixth interrogatory he says, The understanding, intent, and purpose of paragraph III, and *and* the underscored part thereof, of a contract for the sale of lands by the defendant to James F. Aldrich and myself, situate in the counties of Berrien and Van Buren, State of Michigan, bearing date the 28th day of September, 1854, was to secure to the defendant Swain a portion of the purchase money. The amount of $6,666 ⅔ was arrived at, by adding that amount to $10,000, which was previously paid, or to be paid, and was paid, and which made up the amount of one-third of the price of the property. The defendant frequently stated to James F. Aldrich and myself that he considered the property he sold us good security at any time for two-thirds of the purchase price, and the foregoing paragraph referred to in the contract of sale was inserted so as to secure to the defendant one-third of the purchase price of the property.

To the seventh interrogatory he says, Security upon other
211 property as specified in said contract and paragraph III thereof, was given by the said parties of the second part to said contract. The security was given by me. I gave a mortgage to the defendant upon my one-third interest in the Empire mill property, situate in the second ward, city of Milwaukee, and State of Wisconsin. I considered my one-third of said Empire mill property worth ten thousand dollars or more.

To the eighth interrogatory he says, There was no understanding or agreement, at any time, between the defendant, James F. Aldrich, and myself, that other security was to be given upon property other than that conveyed by the defendant to Aldrich and myself for the payment of the mortgage executed by Aldrich and myself to the said defendant that I recollect of.

To the ninth interrogatory he says, The reason for the building of the saw mill as erected by Medbery & Aldrich, from one of the dimensions of fifty by one hundred and fifty feet, were that we should have a better mill, one that would do more work at a less expense, the mill as built cost at least one-third more, and has at least one-third more capacity than a mill of the dimensions of fifty by one hundred and fifty feet, as the one at first intended.

To the tenth interrogatory he says, About the time of the completion of the mill as built by myself and Aldrich, in the month of May or June, in the year 1856. I had a conversation with the said defendant, Isaac N. Swain, in relation to the change of the first plan of the said mill; the conversation took place in the mill at Watervliet, Michigan. J. S. Stewart and Mr. Miller were present with myself and the defendant. Mr. Miller and myself explained to the
212 defendant the advantages of the change in the plan or dimensions of the mill, and the reason of such change. We all examined the mill through thoroughly in every part. After we had completed said inspection I asked the defendant, Mr. Swain, if he was

satisfied with the change as made, and was willing to consent to it, and he replied that he was. Some other general conversation took place in regard to the additional cost of the mill, the particulars of which I do not remember. The defendant in that interview made no objection to the change in the plan and dimensions of the saw mill.

To the eleventh interrogatory he says, I do not.

JOHN W. MEDBERY.

To the first cross-interrogatory he says, Martin Ruggles drove a portion of the piles under a contract in the fall of the year 1854, and superintended the driving of a portion under the direction Medbery and Aldrich, in the spring of the year 1855.

To the second cross-interrogatory he says, No; but they did build a saw mill seventy-eight by one hundred feet, commenced in the fall of 1854.

To the third cross-interrogatory he says, They did not commence work on the saw mill in the spring of 1856, but commenced on the running year in the spring of 1855.

To the fourth cross-interrogatory he says, A part of the piling to the bulkhead gave way; some ten feet at the northeast corner of the saw mill soon after the water was raised or let in, which was on the completion of the saw mill.

213 To the fifth cross-interrogatory he says, I may have given some directions, under the advice of others, without any reference to any particular part of the foundation, and I was present at different times during the driving of the piles; not a large portion of the time.

To the sixth cross-interrogatory he says, I have deeded the property, but cannot here state whether it was a warranty deed, or definitely the names of the parties.

To the seventh cross-interrogatory he says, I have no interest that I am aware of in the event of this suit. I saw the defendant at Watervliet, Michigan, in the month of May or June, 1856, after the mill was completed, or nearly so. I do not remember of his being present before that time. The change was concluded upon early in the spring of the year 1855. It was done at the suggestion of Mr. Stewart and Mr. Miller, whom I considered competent to advise. I do not know where the defendant was when the change was made; I do not know when the defendant first knew of the change, but do know that he knew of it in the month of May or June, 1856. The change was from the dimensions of fifty by one hundred and fifty feet to seventy-eight by one hundred feet. The size of the mill for which Medbery & Aldrich drove piles was seventy-eight by one hundred feet.

JOHN W. MEDBERY.

STATE OF ARKANSAS, *County of Pulaski, ss:*

214 I, the subscriber, a commissioner duly appointed by the annexed commission issued out of and under the seal of the circuit court of the United States, for the 9th circuit and dis-

trict of Wisconsin, do hereby certify that the foregoing deposition was taken by me at Little Rock, in the State of Arkansas, on the fifth day of November, 1864; that the said witness, John W. Medbery, was first duly sworn by me to testify to the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories annexed to said commission, and that his answers thereto were reduced to writing by me, and the same was then carefully read to said witness and signed by him.

Witness my hand and seal this fifth day of November, A. D. 1864.

[SEAL.] J. H. SKIDMORE, *Commissioner.*

[5-cent revenue stamp, cancelled.]

The complainants further offered and read in evidence the deposition of William Aldrich as follows, to wit:

215 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Samuel Dale, jr., esq., greeting:

[SEAL.] Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine William Aldrich, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stephens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part of the complainants, upon the interrogatories annexed to this commission, and, therefore, you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said to come before you, and then and there examine on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit court of the United States, before the judge thereof, with all convenient speed.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

216 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts there-

from, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in the said district of Wisconsin, this 19th day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

217 Interrogatories to be administered to William Aldrich, of the city of Chicago, in the State of Illinois, to be produced, sworn, and examined under and by virtue of the annexed commission, before Samuel Dale, jr., residing in the said city of Chicago, State of Illinois, in a certain cause now pending and at issue in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part and behalf the said complainants:

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Do you know the parties, complainants and defendant in the title of these interrogatories named, or either and which of them, and how long have you known them, or either and which of them?

Third interrogatory. State whether or not you were, at any time, interested in the lands and saw mill situate at or near Watervliet, State of Michigan, and formerly owned by Medbery & Aldrich. If yea, how, when, and with whom?

Fourth interrogatory. Did you at any time, and if so, when and where, have a settlement with the said defendant for and on behalf of Carr & Aldrich, as to the amount due upon the mortgage, upon the lands referred to in the 3d interrogatory, and executed by John W. Medbery & James F. Aldrich to the said defendant, and what amount of money was claimed to be due by the defendant, and paid to said defendant?

Fifth interrogatory. You will please examine the papers hereto annexed, marked exhibit A and exhibit B, and state whether or not you ever had the same in your possession. If yea, from whom did you receive such papers, when and where, and what was the amount of money paid at the date thereof, by whom and to whom? In whose handwriting is the body of said exhibit A, and whose is the signatures thereto attached?

218 Sixth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY,
Comp'l'ts' Sol'r.

Exhibit A.

John W. Medbery and James F. Aldrich in bond and mortgage ac. of 14th April, 1855, with Isaac N. Swain, Dr.

Sept. 28, '57.	To interest on 30,000, 1 year, at 7 p. ct., now due.....	2,100 00	
Sept. 28, '57.	To third instalment, now due..	5,000 00	
		7,100 00	
June 12th, '58.	To interest on above sum (in decree) from Sept. 28, '57, 8 mo. 14 das.	500 93	Am't of decree. 7,600 93
Nov. 27, '58.	To interest on above sum from June 12. '58, at 10 p. ct., 5 mos. 15 das.		211 87
			7,812 80
Sept. 28, '58.	To interest on $25,000 00, 1 year, at 7 p. ct., now due..	1,750 00	
Sept. 28, '58.	To fourth instalment, now due	5,000 00	
		6,750 00	
Nov. 27, '58.	To interest on last above sum from Sept. 28, '58, at 10 per ct.....	110 63	6,860 63
Oct. 12, '57.	To insurance premium paid R. C. Paine, as per rec't....	236 50	467 49
Sept. 28, '58.	To interest on this premium, 11 mos. 16 das., at 7 p. ct..	15 92	
		252 42	
Nov. 27, '58.	To interest on this am't from Sept. 28, '58, 1 mo. 29 das., at 10 p. ct.	4 13	256 55
Sept. 27, '58.	To insurance premium paid in New York.....	210 00	
Nov. 27, '58.	To interest on this $210 00, 2 months, at 10 p. ct.....	3 50	213 50
Sept. 24, '58.	To taxes and charges paid Bailey & Co.....	91 00	
Nov. 27, '58.	To interest on this $91 00, 2 mos. 3 das., at 10 p. ct....	1 58	92 58
			$15,236 06

Niles, Nov. 27, 1858.
Rec'd pay. and endorsed on the bond. I. N. SWAIN.

Exhibit B.

219 MARKET FIRE INSURANCE CO.,
Office 37 *Wall st., New York,* 27 *Sept.,* 1858.

Received from Isaac N. Swain, esq., two hundred and ten dollars for premium on policy of insurance in the Market, Irving, and Resolute Ins. Co., two thousand dollars each, for ac. of *of* Messrs. Medbery & Aldrich.

$210. H. P. FREEMAN, *Sec'y.*

220 U. S. circuit court, district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

The deposition of William Aldrich, a witness produced, sworn, and examined on the part of the complainants in the above-entitled cause, taken at my office, in the city of Chicago, Illinois, on the 22d day of July, A. D. 1864, by virtue of the annexed commission to me, Samuel Dale, jr., directed. Said witness deposes and says, in answer to the following interrogatories, as follows:

First interrogatory. What is your name, age, and occupation, and where do you now reside?

Answer. My name is William Aldrich; I am forty-four years of age; I am a merchant, and my residence is Chicago, Illinois.

Second interrogatory. Do you know the parties, complainants and defendants, in the title to these interrogatories named, or either, and which of them, and how long have you known them, or either, and which of them?

Answer. I know Stephen H. Seamans and Edward P. Whaling, of the complainants, and the defendant, Isaac N. Swain. Have known Seamans twelve years; Whaling about five years, and Swain near six years.

Third interrogatory. State whether or not you were, at any
221 time, interested in the lands and saw mill situate at or near Watervliet, State of Michigan, and formerly owned by Medbery & Aldrich. If yea, how, when, and with whom?

Answer. Yes; I owned an individual one-half from November, 1858, to January or February, 1861, and Joseph Carr owned the other half.

Fourth interrogatory. Did you at any time, and if so, when and where, have a settlement with the said defendant for and on behalf of Carr & Aldrich as to the amount due upon the mortgage upon the lands referred to in the 3d interrogatory, and executed by John W. Medbery and James F. Aldrich to the said defendant, and what amount of money was claimed to be due by the defendant, and paid to said defendant?

Answer. I had such settlement at the city of Niles, Michigan, on or about the 27th of November, 1858, and paid said defendant the

amount claimed by him to be due at that time, namely, the sum of fifteen thousand two hundred and thirty-six dollars ($15,236) upon the mortgage referred to in the interrogatory.

Fifth interrogatory. You will please examine the papers hereto annexed, marked "exhibit A" and "exhibit B," and state whether or not you ever had the same in your possession. If yea,
222 from whom did you receive such papers, when and where, and what was the amount of money paid at the date thereof, by whom, and to whom? In whose handwriting is the body of said exhibit A, and whose is the signature thereto attached?

Answer. I have examined the papers marked exhibit A and exhibit B. I have had the same in my possession; received them from the defendant at the city of Niles, Michigan, on or about the 27th of November, 1858. The amount of money paid to said defendant at that time was fifteen thousand two hundred and thirty-six dollars, ($15,236,) and was paid by myself, on behalf of Carr & Aldrich. The body of said exhibit A and the signature thereto are in the handwriting of the said defendant, Isaac N. Swain.

Sixth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer. I know of further sums of money being paid to the said defendant upon the mortgage referred to in the 4th interrogatory, and which were paid in the years 1859 and 1860, by and on behalf of the said Carr & Aldrich, the amount not remembered, but I think between three thousand dollars and five thousand dollars. I
223 further know of extensive improvements upon, and some damage to, said property during the time it was in possession of Medbery & Aldrich, and the said Carr & Aldrich; but whether they are material to this examination I know not.

WM. ALDRICH.

I, Samuel Dale, jr., do hereby certify that the foregoing deposition was taken before me at my office in the city of Chicago, Illinois, on the 22d day of July, 1864; that before the taking of the same the said witness was sworn by me to testify the truth, the whole truth, and nothing but the truth, in answer to the interrogatories proposed to him; that it was reduced to writing by myself, and was subscribed by the said witness in my presence, after the same was so reduced to writing and read over to him.

SAMUEL DALE, JR.,
Commissioner.

Fees, $5.

[5-cent revenue stamp, cancelled.]

The complainants further offered and read in evidence the deposition of Henry A. Miller, as follows, to wit:

224 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Henry W. Watson, esq., greeting:

[SEAL.] Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine Henry A. Miller, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part of the complainants, upon the interrogatories annexed to this commission, and, therefore, you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Henry A. Miller to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit court of the United States, before the judges thereof, with all convenient speed.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this 30th day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

225 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of the respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court of the city of Milwaukee, in the said district of Wisconsin, this 30th day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

226 Interrogatories to be administered to Henry A. Miller, of Williamsport, Lycoming county, State of Pennsylvania, to be produced, sworn, and examined under and by virtue of the annexed commission, before Henry W. Watson, esq., residing at Williamsport, Lycoming county, State of Pennsylvania, in a certain cause

now pending and at issue in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part and behalf of the said complainants:

First interrogatory. What is your name, age, and occupation, and where do you at present reside?

Second interrogatory. Do you know the parties, complainants and defendant, in the title of these interrogatories named, or either and which of them, and how long have you known them, or either and which of them?

Third interrogatory. What is your present business or occupation, and how long have you been engaged in such business or occupation?

Fourth interrogatory. If, in answer to the last interrogatory, you shall state that your business or occupation is that of building or superintending the building of saw mills, and the construction of the machinery appertaining thereto, state how many saw mills have you constructed, or superintended the construction thereof, when and where.

Fifth interrogatory. State whether or not you constructed, or superintended the construction of a saw mill at Watervliet, State of Michigan. If yea, when, and for whom? When was such mill completed and in running order? What were the dimensions of said mill, including those parts under and not under cover? What were the dimensions of said mill not under cover? What were the dimensions of said mill under cover? By what name is that part of said mill not under cover called or known, and for what purposes used or required?

Sixth interrogatory. State whether or not, in your opinion, the platform connected with the saw mill built for Medbery & Aldrich was a necessary part of said mill. If yea, give your reasons therefor?

227 Seventh interrogatory. What was the value of the saw mill as built by Medbery & Aldrich? What would have been the value of a saw mill built upon the same premises and stream of water upon which the mill of Medbery & Aldrich was built, of the dimensions of fifty by one hundred and fifty feet, and upon the necessary foundations? Which of said mills would have been the more valuable, and wherein and why? State fully.

Eighth interrogatory. State whether or not you have built similar mills to the one built for Medbery & Aldrich, as to its size, construction, and machinery. If yea, state what was the average cost and value of said mills.

Ninth interrogatory. What is your opinion in reference to the saw mill built for Medbery & Aldrich, as to its class and as to its capacity? What was its capacity? How many gangs of saws did it contain, and what other machinery?

Tenth interrogatory. How would a saw mill of the dimensions of fifty by one hundred and fifty feet, erected upon the same premises

and stream as the mill of Medbery & Aldrich, be required to be built, having reference to the stream of water? How many gangs of saws, so as to work to advantage, could be put into such a mill? In your opinion would such a mill be considered a first-class gang mill, and why? What would have been its capacity?

Eleventh interrogatory. State whether or not, in your opinion, the mill, as erected for Medbery & Aldrich, was more valuable and better adapted for the purposes intended, than would have been a mill erected upon the same premises and stream of water of the dimensions of fifty by one hundred and fifty feet. If yea, why, wherein? Give your reasons therefor; state fully.

Twelfth interrogatory. State whether or not, in your opinion, a saw mill of the dimensions of fifty by one hundred and fifty feet, built upon the same premises and stream of water as the mill of Medbery & Aldrich, would have admitted of the construction of any better railway facilities for passing logs and lumber through the length of the mill, from saw carriage to saw carriage, and
228 thence, when manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by Medbery & Aldrich, and why?

Thirteenth interrogatory. State whether or not, in your opinion, the saw mill, as built by Medbury & Aldrich, was well and perfectly built?

Fourteenth interrogatory. If any, what were the causes or reasons for building the saw mill, as erected by Medbury & Aldrich, from one of the dimensions of fifty by one hundred and fifty feet? State fully. Was such change known, or made known to the said defendant; if yea, when, where, by whom, and what was said by the said defendant?

Fifteenth interrogatory. State whether or not the defendant was present at and during the building of the mill of Medbury & Aldrich, at Watervliet, Michigan. If yea, when and how often did you see him there? Did you have any conversation with the said defendant in reference to the change in the dimensions of said mill; if yea, when, where, who was present, and what did the defendant say? Did the defendant ever make any objection to you, or in your presence; and if any, what objection to the change in the dimensions of said mill?

Sixteenth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

N. C. GRIDLEY,
Compl'ts' Sol'r.

229 Circuit court of the United States, district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN.

The defendant, by Finches, Lynde & Miller, comes and objects to the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, and 15th direct interrogatories propounded to the witness, Henry A. Miller, for the reason that said interrogatories, and each of them, call for testimony that is immaterial, irrelevant, and incompetent; that said interrogatories, and each of them, seek to establish the building and value of a saw mill different in size and capacity from the saw mill agreed to be built by Medbury & Aldrich, and seek to vary, by parol evidence, a contract executed under seal, and to show a parol agreement to waive or change the terms of an agreement under seal.

Said defendant, not waiving any of his said objections, but relying upon them, joins in the said commission, and propounds to said witness the following cross-interrogatories:

First cross-interrogatory. What was the size of the saw mill building erected by Medbury & Aldrich, at Watervliet, Berrien county, State of Michigan?

Second cross-interrogatory. Did Medbury & Aldrich ever, to your knowledge, properly build and construct, at Watervliet, in the State of Michigan, a saw mill fifty by one hundred and fifty feet? If yea, state when they ever properly built and constructed a mill of that size and at that place.

Third cross-interrogatory. What year, and what month of the year, did you commence work for Medbury & Aldrich upon the saw mill built by them at Watervliet, in the State of Michigan? And year, and what month in the year, did you leave off work upon said saw mill?

Fourth cross-interrogatory. Was the defendant present during the entire period of time that the said saw mill was being built?
230 When did you first see, to know, the said defendant? Was said defendant at Watervliet, in the State of Michigan, during the summer of 1855? Was he there during the middle or latter part of the month of April, 1855? Was he there at any time after the first of April, 1855—say from the first to the tenth of that month—until after said saw mill was completed? If yea, state where he was andwhat he was doing, and with whom he boarded or stopped.

Fifth cross-interrogatory. If you shall answer the fifteenth direct interrogatroy by saying that the defendant was present at and during the building of the mill of Medbury & Aldrich, at Watervliet, Michigan, state whether you mean that he was present at and during the entire time occupied in building said saw mill. If not present during the entire time, state when and at what period of time, giving, as near as you can, the month and the year that he was at and present during the building of said saw mill.

Sixth cross-interrogatory. Do you not know that the fact was and is, that the said defendant left Watervliet, in the State of Michigan, about the first days of the month of April, 1855, and went east to the New England States, and remained there during the entire balance of the year 1855, and until February, 1856?

Seventh cross-interrogatory. Was you at Watervliet in the fall of 1854? If yea, do you know the piles that were driven that fall for the foundation of a saw mill fifty by one hundred and fifty feet? Who drove the piles that fall? Who drove the piles in the spring of 1855? What time in the spring of 1855 did the party who commenced driving piles that spring begin his work? Was it as early as the third week in April, 1855?

Eighth cross-interrogatory. Had there been any work done in the spring of the year 1855, prior to the change in the original plan or size of the mill, upon the foundations for the mill? If yea, how long, or about how long, prior to the change made in the plan or size of the mill? What was the change made in the plan and size of the saw mill? Who proposed the change? For what purpose was it proposed? What reason, if any, did Stewart give for the change? Did Medbury assign any, and what reason, for the change? And what, if anything, did Aldrich say about the change? State all that was said by either Stewart, Aldrich, or Medbury about the change, and the reasons of the change.

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Ninth cross-interrogatory. Did Medbury, Stewart, or Aldrich, or either of them, ever make any complaint about a shop used by the mute brother of the defendant, that stood upon the race bank, on the south side of the stream, upon which said saw mill was built? If yea, state what they, or either of them, said about that shop, or the said mute brother using it.

Tenth cross-interrogatory. Was it necessary to remove that shop, so occupied by the mute brother of the defendant, in order to build the saw mill that was built by Medbury & Aldrich at Watervliet, Michigan?

Eleventh cross-interrogatory. Would it have been necessary to have removed the shop had a saw mill been built, fifty by one hundred and fifty feet, upon the foundations which were commenced by the driving of piles in the fall of 1854?

Twelfth cross-interrogatory. At the time the change was made in the size and plan of the saw mill built by Medbury & Aldrich at Watervliet, Michigan, was the question of the effect of that change upon that shop presented or discussed by any parties, and by whom? And what was said as to the effect upon said shop, and the water privileges of the said shop, by the change? State all that you heard said upon that point, and who said it.

Thirteenth cross-interrogatory. How and in what manner was said shop removed, and how and in what manner was it left? Was it left in a condition to be used or occupied by the deaf and dumb brother, or any one else, and so that it could be worked with water? Was said shop removed only sufficiently to be reasonably out of the way of said saw mill; and was it a condition and with a view of the deaf and

dumb brother of the defendant having the same use, occupancy, and privilege of the said water power, and of good, free, and easy access, ingress, and egress to and from it, the same as he had it
232 before it was removed by Medbury & Aldrich? Did the said mute brother, by signs, complain of the destruction of his shop?

Fourteenth cross-interrogatory. Would not a saw mill, fifty by one hundred and fifty feet, properly built, be much more expensive, take a much larger quantity of material and timber, than a saw mill sixty feet square?

Fifteenth cross-interrogatory. Is the platform any part of the saw mill building? Suppose the contract called for properly building a saw mill fifty by one hundred and fifty feet, would a platform, such as is inquired about in the sixth interrogatory, be a part of the saw mill?

Sixteenth cross-interrogatory. Do not all saw mills have attached to them, and as a necessary part of them, platforms, railways, logways, slides, flumes, and booms? And is the platform inquired about any more a necessary part of said saw mill than the railways, logways, slides, flumes, and booms? Did not the saw mill in question have railways, logways, slides, flumes, and booms?

Seventeenth cross-interrogatory. Was you present when the bulkhead, under and in front of the saw mill that was built by Medbery & Aldrich, at Watervliet, Michigan, was constructed? If yea, what was the nature and character of that foundation, and how and in what manner were the piles driven for that foundation? State whether you was present each and every day as the work progressed. Were the piles for said bulkhead well and securely driven?

Eighteenth cross-interrogatory. Did the said piles and the bulkhead, or any portion of them, or it, give way soon after the head of water was raised, and did the said saw mill settle on account of their giving way?

Nineteenth cross-interrogatory. Was said bulkhead, to your knowledge, frequently or continually out of repair?

233 Twentieth cross-interrogatory. Do you know the fact that Stewart was exceedingly anxious to hurry up the building of said saw mill, and was not said saw mill built in somewhat of a hurry? Were the foundations of the said mill solid, and was the said saw mill properly built and completed on a safe and secure foundation?

FINCHES, LYNDE & MILLER.
Solicitors for Def't.

234 Deposition of Henry A. Miller, a witness produced, sworn, and examined, on the thirtieth day of August, A. D. one thousand eight hundred and sixty-four, the examination being adjourned and finished on the ninth day of September, A. D. 1864, at the office of Henry W. Watson, the commissioner in the borough of Williamsport, county of Lycoming and State of Pennsylvania, by virtue of the annexed commission issuing out from the circuit court of the United States for the district of Wisconsin, to the said Henry W. Watson, directed

for the examination of the said Henry A. Miller, in a certain cause or proceeding, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part and behalf of said complainants.

1. To the first interrogatory on the part of said complainants, he answers, as follows: My name is Henry A. Miller; my occupation is that of a millwright; my age is fifty-one years; I reside in Athens township, Bradford co., Pennsylvania; but I have been in business near Williamsport, Lycoming co., Pennsylvania, for the last year.

2. To the second interrogatory on the part of said complainants, he answers, as follows: I do not know the parties complainants or either of them. I have seen the defendant a few times, but am not particularly acquainted with him.

3. To the third interrogatory on the part of the said com-
234 plainants, he answers, as follows: My present business is that of building mills, or a millwright, and I have been engaged in it a little over thirty years.

4. To the fourth interrogatory on the part of the said complainants, he answers, as follows: I cannot state the exact number of saw mills I have constructed or superintended the construction of. I have built a great many in Steuben co., New York. I worked at the business there for twelve years. I have built four large ones in Cataraugus co., New York. I have built many elsewhere, among others, one at Watervliet, State of Michigan, for Messrs. Medbury and Aldrich.

5. To the fifth interrogatory on the part of the said complainants, he answers, as follows: I had charge of the building of a saw mill at Watervliet, in the State of Michigan, and putting in the machinery. I commenced it in June, A. D. one thousand eight hundred and fifty-five, and finished in May of the next year. It was completed and in running order in May, A. D. one thousand eight hundred and fifty-six. I think the dimensions of those parts of the mill under cover, were sixty by seventy-eight feet; I cannot tell the dimensions of those parts of the mill not under cover. Those parts of the mill not under cover were called platforms. The lower platforms are used for running lumber out on and sorting lumber ready to run to the piles.

The upper platform was used in sawing long timber or plank
235 for the back truck to run out on. When I left in May, A. D. one thousand eight hundred and fifty-six, these platforms were not on. I think they were both on in the fall after. I think in September, I was back there; the mill was running then.

6. To the sixth interrogatory on the part of the said complainants, he answers, as follows: I think the platform connected with the saw mill built for Medbury and Aldrich, was a very necessary part of said mill. It is necessary to have some place to run the lumber out of the way if it is to be sorted, to put different qualities in different assortments. The platform at the upper side of the mill is necessary in sawing long stuff.

7. To the seventh interrogatory on the part of the said complainants, he answers, as follows: It is pretty hard to tell the value. The

mill must have cost from twenty to twenty-five thousand dollars. A saw mill of the dimensions of fifty by one hundred and fifty feet built upon the same premises and stream of water upon which the mill of Medbury and Aldrich was built, would not be worth twenty thousand dollars, nor would it be worth as much as the one which was built there. In the width of the mill setting up and down stream there would not be room to get the water in for the three gates, and lath mill and edger and jack-wheel, and there would be length which would be of no use, and if it was set cross ways of the stream, it would not have been wide enough, and there was not room to
236 put such a mill the other way at any rate.

8. To the eighth interrogatory on the part of the said complainants, he answers, as follows: I have never built a mill exactly like the one built for Medbury and Aldrich. I have built some very nearly of the same size, construction and machinery, but I did not put in the ship gang, instead I put in a round gang for boards.

HENRY A. MILLER.

Answers to eighth interrogatory continued: It is hard to avarage the cost and value of said mills. The cost depends on so many local circumstances. It would vary from fifteen to thirty thousand dol-dollars.

9. To the ninth interrogatory on the part of the said complainants, he answers, as follows: I am of opinion that it is a first class saw mill. It could cut sixty thousand feet of pine boards in twenty-four hours easily. It contained three gangs of saws, jack-works for hauling the logs into the mill, one edger, and two machines for cutting lath and pickets.

10. To the tenth interrogatory on the part of the said complainants, he answers, as follows: Such a mill, at the same place would have to be built with its length or longest dimensions parallel with the stream. We could not have put in but two unless one was put in below the other two and then the water from the lower one would interfere with the running of the two upper ones. It would
237 not be so good a first class gang mill as the other. Mills are sometimes built that way where it cannot be avoided. Its capacity would depend upon the discharge of the water. If it backed up much the upper gangs could not do so much business, if it did not it might saw as much as the other mill, but it would be inconvenient.

11. To the eleventh interrogatory on the part of the complainants, he answers, as follows: I think the mill as erected was entirely more valuable and better adapted for the purposes intended than would have been a mill upon the same premises and stream of water of the dimensions of fifty by one hundred and fifty feet. It would have been better for the reasons mentioned in the answers to the tenth and seventh interrogatories. The mill would not have been wide enough to put the three gangs in a line, and if one was put below the other it would be very difficult to get the water to it without interfering with the two upper gangs, also to get the water to the jack and edgers and lath machines.

12. To the twelfth interrogatory on the part of the said complainants, he answers, as follows: It would not. They had to run across the stream to the piling ground, and it was just as convenient to run the lumber from the platform as it would have been to run from the mill had it been longer.

13. To the thirteenth interrogatory on the part of said complainants, he answers, as follows: The mill was well built. It was
238 strong. The bulkhead that the trunk or spout was taken out of that drove the jack and edgers was not substantially built. Ten dollars would have made it substantial.

14. To the fourteenth interrogatory on the part of the complainants, he answers, as follows: Because we could not have put the same amount of machinery in to advantage; we should have had more room in length than we needed and not enough in width. I do not know of such change being made known to the defendant, and I do not remember to have heard him say anything about it.

15. To the fifteenth interrogatory on the part of the complainants, he answers, as follows: Isaac N. Swain, the defendant was at Watervliet, Michigan during the building of the mill, two or three times that I saw him. I think he was in the mill once; he never paid any particular attention to it in my presence or seemed to interest himself much about it. I do not recollect of having any conversation with said defendant in reference to the change made in the dimensions of said mill. He never made any objections to me or in my presence to the change in the dimensions of said mill.

16. To the sixteenth interrogatory on the part of said complainants, he answers, as follows: I do not.

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HENRY W. WATSON,
Commissioner.

239 1. To the first cross-interrogatory, on the part of the defendant, said witness answers, as follows: It was sixty by seventy-eight, feet under cover. I do not recollect the size of the platforms.

2. To the second cross-interrogatory, on the part of the defendant, he answers, as follows: They did not to my knowledge.

3. To the third cross-interrogatory, on the part of the defendant, he answers as follows: I commenced in June, A. D. one thousand eight hundred and fifty-five, and left in May, A. D. one thousand eight hundred and fifty-six.

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4. To the fourth cross-interrogatory, on the part of the defendant, he answers, as follows: The defendant was present, to my knowledge, but very little of the time while the mill was being built. I think I saw him, to know him for the first time, in the fall of the year one thousand eight hundred and fifty-five. I don't think I saw him at

Watervleit until pretty late in the fall of that year. I was not there in April of that year. He was there before the mill was finished. I do not recollect where he stopped; I think his brother, a deaf and dumb man, and his mother lived there.

5. To the fifth cross-interrogatory, on the part of the defendant, he answers as follows: He was not present during the whole
240 time, but during very little of the time. I think he was there in the fall of the year one thousand eight hundred and fifty-five, and in the winter of fifty-five and fifty-six, and some time in the spring of fifty-six, I cannot tell the months he was present.

6. To the sixth cross-interrogatory, on the part of the defendant, he answers, as follows: I did not get to Watervleit until in June, A. D. one thousand eight hundred and fifty-five, and can't say where Mr. Swain was; I am strongly impressed, however, that I saw him at Watervleit, in the fall of one thousand eight hundred and fifty-five.

7. To the seventh cross-interrogatory, on the part of the defendant, he answers, as follows: I was never at Watervleit before June, A. D. one thousand eight hundred and fifty-five, and can speak of nothing that happened before I got there. Some of the piles were driven when I got there, and some were driven afterwards.

8. To the eighth cross-interrogatory, on the part of the defendant, he answers as follows: I know nothing about the change, and do not remember of their having contemplated the building of a mill of fifty by one hundred and fifty feet. I do not remember of having heard Stewart saying anything about the change. Stewart brought me plan for a mill sixty feet square, which I changed to the dimensions of the one built. I do not recollect of having
241 heard Medbury and Aldrich, or Stewart, say anything about a change having been made from a mill of fifty by one hundred and fifty feet, to the dimensions of the one built; nor do I remember what, if anything at all, was said about a mill of the dimensions of fifty by one hundred and fifty feet.

9. To the ninth cross-interrogatory, on the part of the defendant, he answers, as follows: I heard Mr. Aldrich say, that the agreement was with Mr. Pidge who moved it; that he was to have moved it about seventy feet to a place staked out on the bank; that it was not set in the place intended for it. I understood this mute brother was to have water enough to turn his lathe, and also the use of the shop.

10. To the tenth cross-interrogatory, on the part of the defendant, he answers as follows: I suppose that it was. It was moved before I got there.

11. To the eleventh cross-interrogatory, on the part of the defendant, he answers, as follows: I cannot tell. I do not know exactly where the shop stood. It was moved before I got there. I understood the place was staked out for the shop by Messrs. Swain, Medbury, & Stewart.

12. To the twelfth cross-interrogatory, on the part of the defendant, he answers, as follows: I know nothing about what took place at the time the change was made; I was not present;

242 I heard no conversation that I knew of as to the effect of the change upon the shop and its water privileges.

13. To the thirteenth cross-interrogatory, on the part of the defendant, he answers, as follows: I can't tell how it was moved. It was left on some blocks. I do not think it could be worked with water as it was left. It was intended for him to have the use of it, and good access to it, and also the privilege of water to run his machinery. I do not know anything about the condition of it, or the chances of getting to it before it was moved. He did not complain, as I know of, of the destruction of his shop. The shop was evidently designed to be placed, after the building of the mill. It could not be well placed before. I don't know who was to place it right.

14. To the fourteenth cross-interrogatory, on the part of the defendant, he answers as follows: It would take more timber; it would be more expensive, but not as expensive in proportion as the one sixty-feet square; that is, the roofing on a narrower building is not as expensive as that on a wider one. It takes more timber to support it, i.e. the roof on the wider building, also longer timber.

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243 15. To the fifteenth cross-interrogatory, on the part of the defendant, he answers, as follows: As a general thing, a platform is a necessary part of a saw-mill building. If a mill was built fifty by one hundred and fifty feet, a plat form would probably not be necessary, as part of the mill might be used in its stead. A platform, such as is inquired about in the sixth direct interrogatory, would be a part of the saw mill.

16. To the sixteenth cross-interrogatory, on the part of the defendant, he answers, as follows: The mills have no booms as a part of the mills. Slides are a necessary part of mills; logways are necessary where slides are not used, and in many cases slides are not necessary where the logs rolled in from the bank, or logways are used. Railways are not a part of the mill, but are generally necessary for the proper conveyance of lumber to the piling ground. In some mills they are not used at all. The platform inquired about was a necessary part of the mill; it i.e., the saw mill in question, had slides and flumes. There were booms in the head race above the mill; there was a railway from the mill to the piling ground.

17. To the seventeenth cross-interrogatory, on the part of the defendant, he answers, as follows: I was present during the building of the mill most of the time. There was no bulkhead in front
244 of the mill; it was under the mill at the end of the flumes. The piles were made out of round logs, cut and sharpened and driven in the ground by a pile driver; they were well driven. The foundation was a good one; the piles driven and timbers spiked on the top of the piles. I was not present every day; I was away two weeks in July—the last of July or first of August. Some of the

piles had been driven before I got there. I think I was there all the time the balance of them were driven. They were not driven particularly for the bulkhead, a line of them went under the bulkhead.

18. To the eighteenth cross-interrogatory, on the part of the defendant, he answers, as follows: I do not know of any of the piles giving way. The sheet piling above the mill gave way some time in the spring, and let the water under one corner of the mill. I do not know that the mill settled any; it was all repaired before the mill was started.

19. To the nineteenth cross-interrogatory, on the part of defendant, he answers, as follows: I do not know of the bulkhead being out of repair. What I have spoken of is the sheet piling for keeping the water from getting under the mill.

20. To the twentieth cross-interrogatory, on the part of the defendant, he answers, as follows: Stewart was anxious to have said saw mill finished; it was not built in a hurry. The foundations were as good as could be got in that place. The nature of the soil
245 was not as good as it is in some places. It was properly built and completed, the machinery was in, the foundation good, and the mill well enclosed. I think the platforms were not put up until after I left; I am not sure.

H. A. MILLER.
HENRY W. WATSON,
Commissioner.

I hereby certify that the above witness, Henry A. Miller, was duly sworn according to law, and examined by me at my office in Williamsport, Penn'a, by reading to him the direct interrogatories on the part of the complainants, as well as the cross-interrogatories on the part of the defendant, and that I reduced his answers to said interrogatories to writing, and that he subscribed them in my presence.

Witness my hand and seal this ninth day of Sept., 1864.

HENRY W. WATSON. [SEAL.]
Commissioner.

[5-cent revenue stamp canceled.]

The complainant further offered, and read in evidence, a certified copy of a deed from the defendant to John W. Medbery and James
F. Aldrich, as follows, to wit:

246 Received for record April 4th, 1856, at 10 o'clock a. m.
E. A. THOMPSON, *Register.*

Isaac N. Swain to Medbury and Aldrich.

This indenture, made the twenty-seventh of March, in the year of our Lord one thousand eight hundred and fifty-five, between Isaac N. Swain and Vallonia S. Swain, his wife, of the township of Watervleit, in the county of Berrien, and State of Michigan, of the first part, and John W. Medbury, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the state of Illi-

nois, both of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of forty thousand dollars to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and, by these presents, do grant, bargain, sell, remise, release, alien, and confirm unto the said parties of the second part, and unto their heirs and assigns forever, all those certain pieces or parcels of land situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, and known and described, as follows, to wit:

One certain piece or parcel of land, being the southwest fractional quarter of section number nine, (9,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, one hundred and ninety-three and fifteen hundredths (193 15-100) acres, more or less. Also, the west half of the northeast quarter of section seventeen, (17,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, eighty (80) acres, more or less. Also, the west fractional part of the southwest fractional quarter of section seven, (7,) in township number three, (3,) south of range number sixteen (16) west, containing, to the United States survey, forty-eight and twenty-hundredths (48 20-100) acres, more or less.

247 Also, the southeast quarter of the southwest fractional quarter of section number seven, (7,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, forty (40) acres, more or less.

Also, the north half of the northwest fractional quarter of section number eighteen, (18,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, sixty three (63) acres, more or less.

Also, the southeast fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, one hundred and twelve and fifty-hundredths (112 50-100) acres, more or less.

Also, the north fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three, (3,) south of range number sixteen (16) west, containing, according to the United States survey, twenty-one and seventy-hundredths (21 70-100) acres, more or less.

Also, the east half of the northeast quarter of section number thirteen, (13,) in township number three, (3,) south of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southeast fraction of section number fourteen, (14,) in township number three, (3,) south of range number seventeen (17) west, containing, according to the United States survey, three and fifty-three hundredths (3 53-100) acres, more or less.

Also, the east half of the northeast quarter of section number

twenty-two, (22,) in township three, (3,) south of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southwest fractional quarter of the northwest fractional quarter of section number twenty-three in township number three, (3,) south of range number seventeen (17) west, containing,
248 according to the United States survey, thirty-nine and forty-hundredths (39 40-100) acres, more or less.

Also, the east half of the northwest fractional quarter of number twenty-three, (23,) in township number three, (3,) south of range number seventeen (17) west, containing, according to the United States survey, sixty-nine and fifteen hundredths (69 15-100) acres, more or less.

Also, the undivided one (1) half of the northeast fractional quarter of section number twenty-three, (23,) in township number three, (3,) south of range number seventeen (17) west, containing, according to the United States survey, one hundred and sixty acres, (160) more or less; less by the bed and bank of the Paw-paw river, as meandered and surveyed by the United States.

Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township number three, (3,) south of range number seventeen (17) west, according to the United States survey, as lies north of the centre of the main public highway, or road leading from Paw-paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervleit, aforesaid, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres. Always excepting and reserving those certain pieces or parcels of land situated in and being parts of the above-described southwest fractional quarter of said section number twenty-three, (23,) and north of said public highway or road; and also, reserving certain other rights and privileges, as hereinafter described and specified, namely: For the purpose of more conveniently and particularly describing said pieces and parcels of land excepted and reserved, be it known, that on the south line of said section number twenty-three, (23,) and four (4) chains and fifty-eight links (by said line) east of the southwest corner of said section number twenty-three, (23,) is a stake, which we will call or denomi-
249 nate "stake No. one," being in the centre of Main street, (so called,) or main public road leading from the township of Bainbridge, in the county of Berrien aforesaid, to said stake "No. one," and thence north six and one-half ($6\frac{1}{2}^{\circ}$) degrees east, (as supposed and allowed, whether more or less) in a straight line passing near the Watervleit mills, and on to a stake on the north line of said section number twenty-three, (23,) which stake is twenty (20) chains and eighty (80) links (by said north line) east of the northwest corner of said section number twenty-three (23.)

One certain piece or parcel of land excepted and reserved from this sale and conveyance, and known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, nine (9) chains and forty-seven and a half ($47\frac{1}{2}$) links north,

six and a half (6½°) degrees east from said "stake No. one;" thence north eighty-three and a half (83½°) degrees, west two (2) chains and forty (40) feet; thence north six and a half (6½°) degrees, east one (1) chain; thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south six and a half (6½°) degrees, west along the centre of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, eleven (11) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. one;" thence north eighty-three and a half (83½°) degrees, west two chains and forty (40) feet; thence north *thence north* six and a half (6½°) degrees, east one (1) chain; thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty (40) feet to the centre
250 of said Main street; thence south six and a half (6½°) degrees, west along said centre of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, thirteen (13) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. one;" thence south eighty three and a half (83½°) degrees, east five (5) chains and forty (40) feet; thence north six and a half (6½°) degrees, east two (2) chains; thence south eighty-three and a half (83½°) degrees, east seven (7) chains and fifty (50) links; thence north six and a half (6½°) degrees, east four (4) chains; thence north eighty-three and a half (83½°) degrees, west seven (7) chains and fifty (50) links; thence south six and a half (6½°) degrees, west three (3) chains; thence north eighty-three and a half (83½°) degrees, west five (5) chains and forty (40) feet to the centre of said Main street; thence south six and a half (6½°) degrees, west along the centre of said Main street three (3) chains, to the place of beginning, containing four and sixty-eight hundredths (4 68-100) acres, together with its appurtenances.

Also, one certain piece or parcel of land exceped from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, fourteen (14) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. one;" thence north eighty-three and a half (83½°) degrees, west two (2) chains and forty (40) feet; thence north six and a half (6½°) degrees, east one (1) chain; thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south six and
251 a half (6½°) degrees, west along the centre of said Main street

one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street sixteen (16) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. one;" thence north eighty-three and a half (83½°) degrees, west two (2) chains and forty (40) feet; thence north six and a half (6½°) degrees, east one (1) chain; thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south six and a half (6½°) degrees, west along the centre of said Main street one (1) chain, to place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece of land executed and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the center of said Main street, seventeen (17) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. one;" thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty-four (44) links to the top of the west bluff or hill along Mill creek; thence north six and a half (6½°) degrees, east one (1) chain; thence north eighty-three and a half (83½°) degrees, west two chains and forty-four (44) feet to the center of said Main street; thence south six and a half (6½°) degrees, west along the centre of said Main street one (1) chain, to the place of beginning, containing twenty-eight one-hundredths
252 (28-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land, excepted from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, nineteen (19) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake, No. one;" thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty 40 feet or to the top of the bluff on the west side of the Mill creek; thence north six and a half (6½°) degrees, east one (1) chain along the top of said bluff; thence north eighty-three and a half (83½°) degrees, west five (5) chains and fourteen (14) feet; thence south six and a half (6½°) degrees, west one (1) chain; thence south eighty-three and a half (83½°) degrees, east two (2) chains and forty (40) feet to the centre of the said Main street, the place of beginning, containing fifty-two hundredths (52-100) of an acre, together with the appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, twenty-one (21) chains and forty-seven and a half (47½) links north, six and a half (6½°) degrees east from said "stake No. 1;" thence south eighty-three and a half (83½°) degrees, east four (4) chains; thence north six and a half (6½°) degrees, east one (1) chain; thence north eighty-three and a half (83½°) degrees, west eight (8)

chains and forty (40) feet; thence south six and a half ($6\frac{1}{2}$°) degrees, west one (1) chain; thence south eighty-three and a half ($83\frac{1}{2}$°) degrees, east four chains and forty (40) feet to the centre of said Main street, the place of beginning, containing ninety-two hundredths (92-100) of an acre, together with its appurtenances.

253 Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, twenty-three (23) chains and forty-seven and a half ($47\frac{1}{2}$) links north, six and a half ($6\frac{1}{2}$°) degrees east from said "stake No. one;" thence north eighty-three and a half ($83\frac{1}{2}$°) degrees, west two (2) chains and forty (40) feet; thence north six and a half ($6\frac{1}{2}$°) degrees, east one (1) chain; thence south eighty-three and a half ($83\frac{1}{2}$°) degrees, east two (2) chains and for (40) feet to the centre of said Main street; thence south six and a half ($6\frac{1}{2}$°) degrees, west along the centre of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street, twenty-four (24) chains and forty-seven and a half ($47\frac{1}{2}$) links north, six and a half ($6\frac{1}{2}$°) degrees east from said "stake No. one;" thence south eighty-three and a half ($83\frac{1}{2}$°) degrees, east two (2) chains and twenty-five (25) links; thence north six and a half ($6\frac{1}{2}$°) degrees, east three (3) chains; thence north eighty-three and a half ($83\frac{1}{2}$°) degrees, west two (2) chains and twenty-five (25) links to the centre of said Main street; thence south six and a half ($6\frac{1}{2}$°) degrees, west three (3) chains along the centre of said Main street, to the place of beginning, containing sixty-eight hundredths (68-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a stake in the centre of said Main street,

254 twenty-five (25) chains and seventy-five (75) links north, six and a half ($6\frac{1}{2}$°) degrees east from said "stake No. one;" thence north eighty-three and a half ($83\frac{1}{2}$°) west two (2) chains and forty (40) feet; thence north six and a half ($6\frac{1}{2}$°) degrees, east one (1) chain; thence south eighty-three and a half ($83\frac{1}{2}$°) degrees, east two (2) chains and forty (40) feet to the centre of said Main street; thence south six and a half ($6\frac{1}{2}$°) degrees, west along the centre of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre, together with its appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale conveyance, known and described as being a small lot two rods wide and six (6) rods long, on which is situated the blacksmith shop, now owned by R. N. Valalten, and which lot was sold on or about the 12th day of September, A. D. 1850, and deeded by the said parties of the first part to Henry R. Holland, with its appurtenances, reference being had to said deed will more fully show.

Also, one certain piece or parcel of land, excepted and reserved from this conveyance, known, bounded, and described as follows, to wit: beginning at a stake standing on the south meandering line of the Paw Paw river, as surveyed by the United States, and forty (40) feet east of the centre of said Main street; thence south six and a half ($6\frac{1}{2}$°) degrees west, three (3) chains and *and* thirty-three and one-third ($33\frac{1}{3}$°) links; thence south eighty-three and a half ($83\frac{1}{2}$°) degrees, east one (1) chain and fifty (50) links; thence north six and a half ($6\frac{1}{2}$°) degrees, east parallel with the line of said Main street to the south meandering line of said Paw Paw river; thence northweasterly along said south meandering line of said Paw Paw river to said
255 stake, the place of begining, containing one half ($\frac{1}{2}$) of an acre, together with its rights and appurtenances.

Also, one certain piece or parcel of land, excepted and reserved from this sale and conveyance, known, bounded, and described as follows, to wit: beginning at a point seventy-five (75) links north and from the centre of said public highway or road aforesaid, leading from Paw Paw to St. Joseph, as surveyed by said Jehiel Enos, and recorded as aforesaid, which point is the southwest corner post of ground cleared off and fenced for a burying ground, and is about eleven (11) chains and eighty (80) links west of the east line of said southwest fractional quarter of said section number twenty-three (23;) thence north five (5°) degrees, west five (5) chains and seventy-one (71) links; thence north eighty-four (84°) degrees and fifty (50′) minutes, east four (4) chains; thence south five (5°) degrees, east four (4) chains and twenty-nine (29) links, to a point seventy-five (75) links from the centre of said highway or road last aforesaid; thence south seventy (70°) degrees, west along parrallel with the centre of said road or highway last aforesaid, to said point, the place of beginning, containing two (2) acres of land, together with its appurtenances.

Also, the use and occupancy of the house, out-houses, and fixtures, and *and* premises enclosed therewith, where the parties of the first part now reside on said premises including in this conveyance, are hereby excepted and reserved by said parties of the first part until the twenty-eight day of September next, after the date hereof, then this reserve to be fully complete and ended.

Also, the use and occupancy of the shop, building, and fixtures connected with the same where Russel Swain, a deaf mute, now
256 occupies, together with the use of the water as now *as now* used or in a similar way, is hereby excepted and reserved, so long as Russel Swain chooses or desires and shall occupy the same, free of any rent, let, or unnecessary hindrance, otherwise than if in the way of other important improvements, may be removed sufficiently to be reasonably out of the way, and where he can have the same use and privilege as before, and when said Russel Swain is done with it, or abandons it, not to occupy any more, then this reserve is to terminate and be fully complete and ended.

Also, it is understood and agreed by the parties to this indenture, that school district number two, (2,) in the township of Watervliet aforesaid, which owns the school-house upon said premises, is to have

the use of the ground fenced out arround the same, of one (1) square chain, so long as said district desires and may occupy said school-house for school purposes, or may move the same, then this reserve for the use of ground to fully complete and ended.

Also, it is understood and agreed as last aforesaid, that the small building owned and occupied by James W. Redding for a "variety store," situated on premises included in this sale and conveyance, is excepted and reserved, and may stand where it does while convenient to the owners of the land it stands upon, at a resonable rent for the use of the land occupied, or be removed on giving the owner of the building reasonable notice to do so, without any let or hindrance whatever, together with all and singular the hereditaments and appurtenances thereto. The said premises above described, and not reserved or excepted, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents,
257 issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, of the said parties of the first part, either in law or equity, of, in, and to the above sold and bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises not exeepted or reserved, with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever. And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant and agree, to and with the said parties of the second, their heirs and assigns, that, at the time of the ensealing and delivery of these presents, they are well seized of the premises above described, and not excepted or reserved, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law in fee simple, and that the said lands and premises are free from all incumbrances whatsoever, and that the above bargained premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ISAAC N. SWAIN. [SEAL.]
VALLONIA S. SWAIN. [SEAL.]

Signed and sealed in presence of—
M. A. DAILEY.
J. W. REDDING.

STATE OF MICHIGAN, *Berrien county, ss:*

On this twenty-seventh day of March, A.D. 1855, before me, a justice of the peace in and for said county, personally appeared Isaac N. Swain, and Vallonia S. Swain, his wife, who are known to me
258 to be the persons who executed the above and foregoing instrument, and acknowledged the same to be their free act and deed. And the said Vallonia S. Swain, being by me examined se-

perately and apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion from any one.

JAMES W. REDDING,
Justice of the Peace.

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Stephen W. Duncombe, register of deeds in and for said county, do hereby certify that I have carefully compared the within and foregoing deed from Isaac N. Swain and Vallonia S. Swain, his wife, to John W. Medbury and James F. Aldrich, with the record of the said deed now remaining in my said office, and that the same is a true, accurate, and exact copy of the said deed, and of the whole thereof, as the same appears of record in my office, in Liber "N" of Deeds, on pages 361, 362, 363, 364, 365, 366, 367, and 368.

Witness my hand and seal of office, this third day of June, A. D. 1865, at Paw Paw, in the county of Van Buren, and State of Michigan.

[SEAL.] STEPHEN W. DUNCOMBE,
Register of Deeds, Van Buren Co., Mich.

[5-cent stamp.]

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Benjamin F. Graves, presiding judge of the circuit court of Van Buren county, State of Michigan, do hereby certify that the foregoing exemplification and attestation, made by Stephen W. Duncombe, register of deeds of the county of Van Buren, and State of Michigan, and whose name is thereto subscribed, are in due form and made by the proper officer, and that the signature thereto is the signa-
259 ture of the said Stephen W. Duncombe, register of deeds as aforesaid.

Witness my hand this sixth day of June, A. D. 1865.

BENJAMIN F. GRAVES,
Presiding Judge of the Circuit Court in and for the County of Van Buren and State of Michigan.

[Five cent stamp.]

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Ashbel H. Herron, clerk of the circuit court in and for the county of Van Buren, and State of Michigan, do hereby certify that the Honorable Benjamin F. Graves, esq., by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of the making thereof, and still is, presiding judge of the circuit court in and for the county of Van Buren, State of Michigan, duly elected and sworn, to all whose acts as such full faith and credit is and ought to be given, as well in courts of justice as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this sixth day of June, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] ASHBEL H. HERRON,
Clerk of the Circuit Court in and for the County of Van Buren, State of Michigan.

the use of the ground fenced out arround the same, of one (1) square chain, so long as said district desires and may occupy said school-house for school purposes, or may move the same, then this reserve for the use of ground to fully complete and ended.

Also, it is understood and agreed as last aforesaid, that the small building owned and occupied by James W. Redding for a "variety store," situated on premises included in this sale and conveyance, is excepted and reserved, and may stand where it does while convenient to the owners of the land it stands upon, at a resonable rent for the use of the land occupied, or be removed on giving the owner of the building reasonable notice to do so, without any let or hindrance whatever, together with all and singular the hereditaments and appurtenances thereto. The said premises above described, and not reserved or excepted, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents,
257 issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, of the said parties of the first part, either in law or equity, of, in, and to the above sold and bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises not excepted or reserved, with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever. And the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant and agree, to and with the said parties of the second, their heirs and assigns, that, at the time of the ensealing and delivery of these presents, they are well seized of the premises above described, and not excepted or reserved, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law in fee simple, and that the said lands and premises are free from all incumbrances whatsoever, and that the above bargained premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ISAAC N. SWAIN, [SEAL.]
VALLONIA S. SWAIN. [SEAL.]

Signed and sealed in presence of—
M. A. DAILEY.
J. W. REDDING.

STATE OF MICHIGAN, *Berrien county, ss:*

On this twenty-seventh day of March, A.D. 1855, before me, a justice of the peace in and for said county, personally appeared Isaac N. Swain, and Vallonia S. Swain, his wife, who are known to me
258 to be the persons who executed the above and foregoing instrument, and acknowledged the same to be their free act and deed. And the said Vallonia S. Swain, being by me examined se-

perately and apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion from any one.

JAMES W. REDDING,
Justice of the Peace.

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Stephen W. Duncombe, register of deeds in and for said county, do hereby certify that I have carefully compared the within and foregoing deed from Isaac N. Swain and Vallonia S. Swain, his wife, to John W. Medbury and James F. Aldrich, with the record of the said deed now remaining in my said office, and that the same is a true, accurate, and exact copy of the said deed, and of the whole thereof, as the same appears of record in my office, in Liber "N" of Deeds, on pages 361, 362, 363, 364, 365, 366, 367, and 368.

Witness my hand and seal of office, this third day of June, A. D. 1865, at Paw Paw, in the county of Van Buren, and State of Michigan.

[SEAL.] STEPHEN W. DUNCOMBE,
Register of Deeds, Van Buren Co., Mich.

[5-cent stamp.]

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Benjamin F. Graves, presiding judge of the circuit court of Van Buren county, State of Michigan, do hereby certify that the foregoing exemplification and attestation, made by Stephen W. Duncombe, register of deeds of the county of Van Buren, and State of Michigan, and whose name is thereto subscribed, are in due form and made by the proper officer, and that the signature thereto is the signa-
259 ture of the said Stephen W. Duncombe, register of deeds as aforesaid.

Witness my hand this sixth day of June, A. D. 1865.

BENJAMIN F. GRAVES,
Presiding Judge of the Circuit Court in and for the County of Van Buren and State of Michigan.

[Five cent stamp.]

STATE OF MICHIGAN, *County of Van Buren, ss:*

I, Ashbel H. Herron, clerk of the circuit court in and for the county of Van Buren, and State of Michigan, do hereby certify that the Honorable Benjamin F. Graves, esq., by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of the making thereof, and still is, presiding judge of the circuit court in and for the county of Van Buren, State of Michigan, duly elected and sworn, to all whose acts as such full faith and credit is and ought to be given, as well in courts of justice as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this sixth day of June, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] ASHBEL H. HERRON,
Clerk of the Circuit Court in and for the County of Van Buren, State of Michigan.

260 *Defendant's testimony.*

The defendant, to maintain the issue on his part, offered and read in evidence the deposition of William ~~H. McGee~~ W. McKee, as follows, to wit:

UNITED STATES OF AMERICA,
Western district of Michigan, ss:

Be it remembered, that on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me at my office, in the village of Watervliet, in the western district of Michigan aforesaid, William W. McKee, to testify, and the truth to say, on the part and behalf of the defendant, in a certain suit or matter of controversy now depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamens, Catherine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said William W. McKee, being about the age of sixty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy aforesaid, I did carefully examined the said William W. McKee, and he did thereupon depose, say, and testify as follows, to wit:

My name is William W. McKee; my age is sixty-two years, and upwards; I reside in Watervliet, Berrien county, Michigan. I know the property sold by the defendant to Medbury & Aldrich. The mill portion of the property is situated in the township of Watervliet. I have known the property about fifteen years. The property was in a very good condition when sold by defendant to Medbury and Aldrich.

The property consisted of dwelling houses; tavern stand, partially built; saw mill, with two upright saws; a grist mill, with two run of stones; also, a large amount of timber land. This whole property at the time of the sale, was in excellent repair and in good condition.

261 I know of an old saw mill that stood on the south side of Mill Creek race. The same was afterwards torn down by Medbury & Aldrich. The reason they assigned for tearing it down was to build a new mill.

I know the new mill Medbury and Aldrich built upon a portion of the property purchased by them of the defendant.

I know a shop standing on the south side of Mill Creek race, a little below the old saw mill used by the mute brother of the defendant. At a rough guess, I should say it was 18 by twenty-four feet, and perhaps longer.

He had two turning lathes, one for wood work, the other for iron work; circular saw, and an excellent assortment of tools. He was very particular in the selection of his tools. He used that shop as a source of obtaining a livelihood until it was removed by Aldrich & Medbury.

It was moved off and left in a bad shape, and could not be used as a shop.

It was partially turned up on one end, and still stands in that condition.

Since the destruction of that shop he has had no means of sustaining himself by his own labor. Whenever he could get a little job he would do it, but had no fixed permanent place for doing business. Up to the timeof the destruction of the shop he worked there steadily when his health would permit, and very often would work late in the evening. He was a good mechanic, and had a natural mechanical talent.

I am a brother-in-law of the defendant. Since the destruction of that shop the defendant has supported the mute brother. He, the mute brother, now lives in the house of the defendant, and has since the destruction of the shop. The mute brother was sixty-two years old last September. The mute brother was much excited over the destruction of his shop. He manfested great dissatisfaction about it.

The property sold by the defendant to Medbury & Aldrich in the spring of 1863 was in a miserable condition. The dam was
262 gone off; the race was broken in two places; the bulkhead of the old mill on the south side of the Mill Creek race was washed out; the fences around the improved property was out of repair, and in some places gone; the orchards were uncared for; the railroad to the mill had to be repaired, and some portions of it entirely rebuilt. Since they or their assigns have had the property in their possession there has been a large amount of logs suitable for lumber, mostly pine, taken from the premises. The grist mill sold to them by the defendant was burned while they owned the property. Since the mill was burned, a large barn and shed attached to it were burned.

W. W McKEE.

Taken, subscribed, and sworn to before me, this 22d day of June, 1864, United States circuit court commissioner for the western district of Michigan.

JOHN B. UPTON,
Commissioner.

263 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John B. Upton, circuit court commissioner of the district court of the United States for the western district of Michigan, under and

by virtue of the said several acts of Congress, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness, William McKee, whose deposition is hereto annexed, at the time of the taking said deposition before me resided in the town of Watervliet, county of Berrien, and State of Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said suit, and where said suit is now pending.

I further certify, that no one appeared on the part of the complainants, or either of them, and that no notice of the taking of said deposition was given to said complainants, or either of them, or their solicitors or counsel, or either of them, for the reason that the said complainants, and each of them, and their counsel and solicitors, resided more than one hundred miles from the town of Watervliet, where said deposition was taken.

I further certify, that on the twenty-third day of June, A. D. 1864, I was attended by H. M. Finch, one of the solicitors of said defendants, and who appeared before me for and on behalf of the said defendant, and by the witness, who of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing, in presence of the said witness and myself; and after the same was carefully read by me to him, the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up, and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
Circuit Court Commissioner of the District Court of the United States, in for the Western District of the State of Michigan.

[5 ct. r. s., canc'd.]

264 UNITED STATES OF AMERICA,
Western District of Michigan, ss :

Be it remembered, that on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'an act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed March 1st, 1817, and

the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789. did call and cause personally to appear before me, at my office, in the village of Watervliet, the western district of Michigan aforesaid, John C. Lamb, to testify, and the truth to say, on the part and behalf of the complainants, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

And the said John C. Lamb, being about the age of forty-six years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said John C. Lamb, and he did thereupon depose, say, and testify, as follows, to wit:

My name is John C. Lamb; my age is forty-six years and upwards; I reside in Watervliet, Berrien county State of Michigan. I am acquainted with the defendant Isaac N. Swain. I know the saw mill property purchased of Isaac N. Swain by Aldrich and Medbury. I have known it ten years last past. I know the saw mill erected by Medbury and Aldrich upon the premises. I have measured the saw mill. I measured it this day. It is sixty feet square. I passed by the mill while it was being built nearly every day. I recollect of some piles having been driven for the foundation of the mill in the fall of 1854. I also saw piles driven in the spring of 1855. I recollect the old saw mill that they, Medbury and Aldrich, tore down to build the new mill.

265 The piles driven in 1855, were driven considerable distance below this old saw mill. The soil where the piles were driven in 1855 was a loose sandy soil. and I should think was quick sand. Some of the piles under the foundation of the present mill were well driven and some poorly driven.

It is my impression that it would not have been necessary to have tore down the old mill in order to build the new Mill where it now stands.

I recollect a shop standing on the south side of the Mill race, occupied by the brother of the defendant. He had circle saws in it, also an iron turning lathe, also a wooden turning lathe, and also a good many good tools, equal to any mechanics' tools. The mute brother was an industrious man. His principal occupation was in connection with that shop. It was a source of income to himself, and also of livelihood.

The shop was moved away by Medbery and Aldrich, and rendered useless to him for his business. It was shoved off on an inclined plane and wrecked in moving. It was left partly turned up on end and has remained so from that time till this.

Since that time the mute brother has wrought a little, doing some small job, but has been nearly dependant for his support upon the defendant, his brother. He lives in defendant's house, he has no visible means of support and no fixed place of work. I have been

his physician. If he had the shop as it was when it was moved off, and the tools, he could earn his living. He is a mechanic by occupation. He has a natural capacity for mechanism. He worked in the shop when he was able to work. He was not able to endure exposure from the extremes of the weather.

I recollect that the bulk head built for the present mill went out soon after it was built. It went out at the northeast corner of the mill. I know that they were constantly repairing it. I know the property sold by the defendant to Medbury and Aldrich, at the time of the sale by the defendant to Medbury and Aldrich, and it was in good repair. The dwelling houses, the tavern, the mills, were in good repair. The fences were in good condition, and were
266 good orchards with a good variety of fruit. I knew the same property in the spring of 1863. The water power was useless. It had been carried away and destroyed by floods. The dwelling houses and boarding house were considerably more dilapidated than the natural wear would have been. The orchards had been somewhat neglected and had not received that care and attention they ought to have had.

I know there was considerable sawing timber cut for sawing purposes on the premises and taken off.

I know of a grist mill on the premises at the time of the sale to Medbury and Aldrich. It was a good mill and gave good satisfaction. This mill while they owned the property was destroyed by fire. There was a large barn, with a large open shed attached to it, and they both were burned at the same time. They were burned while these grantees owned the property.

JOHN C. LAMB.

Taken, subscribed, and sworn to before me this 22d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of the State of Michigan.

267 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner of the district court of the United States in and for the western district of the State of Michigan, under and by virtue of the said several acts of Congress in such case made and provided, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, John C. Lamb, whose deposition is hereto annexed at the time of the taking of the said deposition before me, resident in the town of Watervliet, Berrien county, State of Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said suit above entitled, and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them, and that no notice of the taking of said deposition was given to said complainants, or either of them, or

any solicitor of the said complainants, or either of them, for the reason that the said complainants, and each of them, and the solicitors and counsel of said complainants, and each of them, reside more than one hundred miles from said town of Watervliet, where said deposition was taken.

I further certify, that on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of said defendant, and who appeared before me for and on behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,

Circuit Court Commissioner of the District Court of the United States in and for the Western District of Michigan.

[5 cent revenue stamp, cancelled.]

268 UNITED STATES OF AMERICA,

Western District of Michigan, ss:

Be it remembered, that on this twenty-third day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an Act, entitled 'an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the village of Watervliet, in the western district of Michigan aforesaid, Aaron Swain, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON, *Commissioner.*

And the said Aaron Swain, being about the age of sixty-six years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said Aaron Swain, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Aaron Swain. I am sixty-six years of age and upwards. I am brother of the defendant. I reside in Watervliet, Berrien county, State of Michigan. I know the mill property sold by the defendant, in the year 1854, to Medbury & Aldrich, in Watervliet. The mill property was in good condition generally. I know that Medbury & Aldrich built a saw mill in Watervliet. I know the location of the new saw mill built by Medbury & Aldrich. I know that my mute brother had a shop in Watervliet, on the south side of Mill Creek race. The shop was a frame building about twenty by thirty-five feet, perhaps larger. It was large enough to be a convenient shop for machinery. He had machinery in the said shop when the mill property was sold to Medbury & Aldrich. He had one
269 wooden turning lathe and one iron turning lathe, also grindstone and circle saw, that were driven by water from Mill Creek race. He had all kinds of tools necessary to carry on his business. His tools were of the first quality; he was using this shop and machinery at the time of the sale to Medbery & Aldrich for the purpose of getting a living. His shop was his principal means of obtaining a livelihood. The shop was removed from its foundations while Medbery & Aldrich owned the property. The shop was removed away from the stream about three times the width of it. They removed it sidewise; they left one side much lower than the other, and much wrecked. They left it much lower than the foundation was on which it stood. It is not suitable for a work shop in its present condition, and as they left it, or for any other purpose. It was entirely destroyed for all practical purposes for the mute brother; it has not been used since that time by the brother, and it could not be. At the time they removed it he was using it for his trade. The basement and foundations of the mill were demolished. Some portion of the mill erected by Medbury & Aldrich occupies a part of the site of that shop. I know the piles that were driven by Mr. Martin Ruggles for the foundation of a mill by Medbery & Aldrich, which I understood was to be one hundred and fifty feet in length by fifty feet in width. The piles driven by Ruggles for Medbury & Aldrich, in the fall of 1854, for the foundation of said mill did not interfere with the shop, but passed to the north of it between five and six feet. The shop would not have interfered with the mill, nor the mill with the shop. I know an old saw mill that stood on the south side of Mill Creek race. From my best recollection I think no piles for the foundation of the mill, the one built by Medbury & Aldrich, were driven on the site of the old mill on the south side of Mill race. I think the mill, as built by Medbury & Aldrich, could have been built without tearing down the old mill. If the mill, as built by Medbury & Aldrich, had been one hundred and fifty feet long and fifty feet wide, it would not have interfered with the shop of my mute brother, but it would have in-

terfered with the old mill, and the old mill was taken down to make way for a new mill fifty by one hundred and fifty feet. Mr.
270 Ruggles had the contract for driving the piles, and used the old mill straightening and sharpening the piles until late in the fall of 1854. The old mill was destroyed late in the fall of 1854. The plan of the mill was changed in the spring of 1855, and instead of constructing the mill one hundred and fifty feet long and fifty feet wide, they built a mill said to be sixty feet square.

It was necessary in building the present mill to remove the shop; if they had removed the shop from five to seven feet, it would have been sufficient for the building of the mill. Since the destruction of the shop my mute brother has had no fixed settled place of business. I know of no other way he had of getting a livelihood, but by what he received from my brother Isaac, the defendant. I know that the defendant has furnished my mute brother with the necessaries of life. My mute brother lives in the house of defendant. The house was furnished by the defendant. With that shop and the tools, implements, and machinery he had in it, and his habits of industry he could have earned his living. I know of his working late at night in the shop very often. My mute brother is sixty-two years of age. He is a mechanic by occupation. He had been accustomed most of the time, since he was eighteen years of age, to work within doors. He is not able to work out doors. He has not even been accustomed as a mechanic to go out to work by the day. He had occupied the shop for several years prior to the sale of the mill property by the defendant to Medbury & Aldrich. My mute brother seemed to be very much dissatisfied and enraged at the tearing down of his shop. He was continually mourning over the loss of his shop and water power. It seemed to be his life and anxiety to possess machinery and water power. He was a good turner. He made his workshop his home. He complained about the removal of his shop, because it threw him out of business, and he was compelled to store his tools and machinery in other places; some of his tools were lost, and some were destroyed; some of the tools and machinery were destroyed in the burning of the foundry, in which they were stored. The destruction of the shop has had a tendency to depress him and make him less spirited. He has frequently threatened to go away and leave his friends on account of it. His conduct on account of it has been a source of distress and anxiety to his friends. Every now and then he gets on a fit of despondency and threatens to leave and go away somewhere else. He is entirely deaf and dumb, and has
271 been always so. He seemed to really enjoy himself in his work shop. He was smart, quick, intelligent, and ready about his business. I know of his building wagons in his shop. I know the condition of the property sold by defendant to Medbury & Aldrich as it was in the spring of 1863. It was in a very bad condition. It was all out of repair. The dam was gone; the head gates were gone; there were two large breaks in the race; the bulkhead of the mill standing north of the main race was destroyed. The general appearance of the whole property was of dilapidation and decay.

When the property was sold by the defendant to Medbury & Aldrich, there was a very large quantity of good sawing timber there. I know there was a vast amount of lumber sawed at the mill while Medbury & Aldrich owned the property. I know that the defendant left Watervliet about the first of April, 1855, to go to the eastern States. He was gone and remained away from Watervliet nine or ten months. The mill, built by Medbury & Aldrich, was put up and enclosed while the defendant was away from Watervliet.

AARON SWAIN.

Taken, subscribed, and sworn to before me this 23d day of June, 1864. JOHN B. UPTON, *Commissioner.*

272 UNITED STATES OF AMERICA,
Western District of Michigan, ss :

I, John B. Upton, a commissioner duly appointed by the district court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "an Act, to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, Aaron Swain, whose deposition is hereto annexed, at the time of the taking of the said deposition before me, resided in the town of Watervliet, Berrien county, State of Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said suit, and where said suit is pending.

I further certify, that no one appeared of the said complainants, or either of them, and that no notice of the taking of the said deposition was given to said complainants, or either of them, or their solicitors and counsel, for the reason that the said complaints, or each of them, and their solicitors and counsel resided more than one hundrrd miles from the said town of Watervliet, where said deposition was taken.

I further certify, that on the twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty four, I was attended by H. M. Finch, one of the solicitors of said defendant, and who appeared before me for and on behalf of said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading the same to said witness he subscribed the same in my presence. I have retaind the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
Circuit Court Commissioner of the District Court
Of the United States in and for the Western District
Of the State of Michigan.

[5-cent revenue stamp, cancelled.]

273 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Be it remembered, that on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the village of Watervliet, in the western district of Michigan aforesaid, J. Sanford Burnside to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON, *Commissioner.*

And the said J. Sanford Burnside, being about the age of thirty-two years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said J. Sanford Burnside, and he did thereupon depose, say, and testify, as follows, to wit:

My name is J. Sanford Burnside. My age is thirty-two years and upwards. I reside in Watervliet, Berrien county, State of Michigan. I have resided in this place nine years this next fall. I know the saw mill erected by Medbury & Aldrich in Watervliet. I have known the said saw mill since I have been here. I have been employed in the said mill by Medbury & Aldrich, by Carr & Co., and am still employed in it. I came to Watervliet for the purpose of working in the mill. The most of the time since I came to Watervliet I have worked in the mill, whenever the mill has been running. I am familiar with every part of the whole building. I had

been engaged in the mill business for about two (2) years at Steuben county, State of New York, prior to my coming
274 to Watervleit. The mill is said to be sixty feet square. The mill built by Medbury & Aldrich is connected with old mill by running the roof and floor on to an old mill eighteen feet. I commenced working in the mill, so built by Medbury & Aldrich, as soon as it was completed. The mill was up and enclosed late in the fall of 1855. My business in the mill was sawing. I know where the front bulkhead of the mill is. When we first let the water in we had trouble with the bulkhead. The trouble was, the bulkhead gave away at the northeast corner of the mill erected by Medbury & Aldrich, and the break extended to the south about twelve or fourteen feet under the main mill. The water swept out a hole ten or twelve feet deep, and undermined the foundation, and caused the mill to settle considerably. The effect of the settling of the mill was a great damage to the mill, and a permanent one. There has always been a leakage in the bulkhead. I think that bulkhead was not properly constructed for that mill. I do not think the bulkhead had the strength or durability that it should have had for that mill; it was an imperfect bulkhead. I know that Medbury & Aldrich have claimed that the bulkhead was imperfectly built. They claimed that the builder of the bulkhead imperfectly did the work. It was the common opinion among the workmen, on and in the mill, that the bulkhead was imperfectly built. The bulkhead is so poorly constructed that it depreciates the value of the property greatly. As the bulkhead is constructed, the water constantly leaks under and wears the filling away beneath the mill, undermining the mill. If that mill, built by Medbury & Aldrich, had been built fifty feet by one hundred and fifty feet, up and down the stream, and had been properly built, it would have been far more valuable for the manufacture of lumber than the present mill is. If the mill had been fifty by one hundred and fifty feet, it would have been far more convenient and profitable, and would have cost a great deal more money to have built it. In the month of April, 1863, the property was in the worst possible condition; it was about as bad as it could be. The
275 dam on the Paw-paw river was gone. The head-gates of the race were gone, and there were two large breaks in the race, one above the grist mill and the other above the saw mill. The bulkheads to the old saw mill was also gone, and the bulkhead to the new mill was in a damaged condition. The machinery in the mill was damaged and in bad condition; some of the machinery was taken away.

From the time Medbury & Aldrich took possession of the property, there was a very large amount of valuable ~~prime~~ pine timber stripped from the premises before April, 1863. The fences around the improved property in the village was greatly damaged, and at loose ends in April, 1863, and likewise the buildings and other improvements.

J. SANFORD BURNSIDE.

Taken, subscribed, and sworn to before me, this 22d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner in the Western District of Michigan.

276 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the acts of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, J. Sanford Burnside, whose deposition is hereto annexed, at the time of the taking of the said deposition before me, resided in the town of Watervleit, Berrien county, Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said suit above entitled and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them, and that no notice of the taking of the said deposition was given tothe said complainants, nor to their solicitors, nor either of them, for the reason that the said complainants, and each of them, and the solicitors and counsel of said complainants resided more than one hundred miles from said town of Watervleit, when said deposition was taken.

I further certify, that on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of said defendant, and who appeared before me for and on behalf of said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up, and directing it with my own hand to the court for which the same was taken.

And I do further testify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-

second day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
Commissioner of the District Court in and for the Western District of the State of Michigan.

[5-cent stamp, cancelled.]

277 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Be it remembered, That on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,' " passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th 1789, did cause personally to appear before me, at my office, in the village of Watervleit, the western district of Michigan aforesaid, Daniel C. Johnson, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said Daniel C. Johnson, being about the age of twenty-nine years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said Daniel C. Johnson, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Daniel C. Johnson; my age is twenty nine years and upwards; I reside in Watervliet, Berrien county, State of Michigan. I know the defendant, Isaac N. Swain; I have resided in Watervliet about eighteen years; I know the mill property in Watervliet that was sold by the defendant to Medbery & Aldrich; I knew the property before it was sold to Medbery & Aldrich, and have known it ever since it was sold. At the time the property was sold by the defendant to Medbery & Aldrich there was a grist mill and two saw mills; tavern stand; dwelling houses; three orchards; yards in front of the houses; shade trees in front of the houses; also, a large quantity of sawing timber on the premises. The property was in good condition generally. I know of Medley & Aldrich commencing to build
278 a saw mill on the property. I recollect of some piles being driven by them in the fall of 1854. Martin Ruggles super-

intended the driving of the piles that fall; they commenced that fall at the lower or west end to drive the piles, and drove up stream towards the east. They drove that fall piles fifty or sixty feet east from where they commenced; they continued to drive the piles that fall till cold weather prevented; I assisted in driving the piles in the fall of 1854. The piles driven in the fall of 1864 were well driven; on an average we drove one to one and a half piles per day. Those piles driven that fall were on an average about a foot in diameter; crossways of the stream they were driven about ten feet apart, and about six feet lengthwise up and down the stream. They were driving piles for the foundation of a mill fifty feet wide and one hundred and fifty feet in length. I think I have heard John W. Medbury state the size of the mill they were to build, and it was the size I have mentioned. I have also heard their head men, who were at work on the foundation, while they were at work, say they were driving the piles for the foundation of a mill of that size. If they had continued driving the piles one hundred and fifty feet up the stream, and in an easterly direction, they would have come upon good ground for making a good and secure bulkhead. I recollect of an old saw mill that stood on the south side of the Mill Creek race at a point one hundred and fifty feet from where we commenced to drive the piles. The old mill, to all appearances, had a good foundation; it had not settled any. The old mill was taken down for the purpose of building a new saw mill fifty feet wide and one hundred and fifty feet long. The old mill was taken down either in the fall of 1854, or in the spring of 1855, I am not positive which. I was sawing in the saw mill in the spring of 1855, on the north side of Mill Creek race. They commenced again in the spring of 1855 to drive piles for the foundation of the saw mill east of where they left off in the fall. In the spring of 1855 they changed the form of the shape of the mill. They changed the form of the mill from fifty ~~to~~ by one hundred and fifty feet to sixty feet square, and drove the piles that spring in conformity to the shape and size of a mill sixty feet square.

279 They built a mill sixty feet square upon the piles they drove in the spring, and not on the piles they drove in the fall of 1854. In making the change in shape and size of the mill, they did not get so good a foundation for the bulkhead of the mill as they would have got had they built their mill as first planned. The foundation for the bulkhead to the present mill is a kind of quicksand, and if they had gone up one hundred and fifty feet from the point where they commenced driving piles in the fall of 1854, they would have come upon a good solid foundation for a bulkhead. At that point they would have found a clay hard pan foundation.

I know it would not have been necessary to have torn down the old mill, which was torn down by Medbery & Aldrich, to build the present mill as built by Medbery & Aldrich. The present mill was built and enclosed in the year 1855. I was at the mill about every day in the spring of 1855, and saw how they drove the piles for the foundation for the mill. I observed how those piles were driven

The piles that were driven in the spring were driven from ten to twelve feet; those driven in the fall were driven eighteen feet. I think the piles driven in the spring did not reach a good solid foundation; while those that were driven in the fall of 1854 went down six to eight feet below the quicksand, with a good solid foundation. I know the construction of the bulkhead in front of the front sill of the mill. There were two rows of sheet piling, one inch or one inch and a quarter thick, I think, driven from three to five feet into the quicksand; and if they, in driving, met with any obstruction, they did not remove the obstruction, but cut off the sheet piling, and left it in that imperfect and insecure manner.

For the last fourteen years I have been engaged mostly in saw mill business, and am familiar with building and repairing bulkheads for saw mills; and during said time have helped to build and repair several bulkheads.

The bulkhead to the saw mill, as built by Medbery & Aldrich, was not well constructed with reference to strength and durability. It was not a perfect bulkhead for that mill. It was not built so as to make a safe bulkhead for that mill. After those light, short
280 piling were driven thus imperfectly, the same was never properly puddled with clay, but filled with slabs, pieces of boards, sand, and clay. In a very short time after the water was let on to the bulkhead, the bulkhead, or a portion of it, was washed out near the northeast corner of the mill, and under the foundation of it. It washed out some of the piles, and caused the mill to settle.

The settling of the mill would throw the machinery out of line, & it would not run perfectly. They, Medbury & Aldrich, and their assigns, have, from time to time, and a great many times, attempted to repair the bulkhead. There has been a large amount of time and labor expended in repairs upon the bulkhead, which would not have been necessary if the bulkhead had been properly constructed, and up to the present time it has been a source of delay, expense, and damage.

The bulkhead, as constructed by Medbury & Aldrich is dangerous and injurious to the mill. In my opinion a mill fifty by one hundred and fifty feet, properly built for the manufacture of lumber, would have been worth one-third more than the present mill as constructed by Medbury & Aldrich.

I recollect a shop that stood on the south side of Mill Creek race, below the old mill that was torn down by Medbury and Aldrich, which was used by the mute brother of the defendant.

The shop spoken of did not stand in the way of the erection of a saw mill fifty by one hundred & fifty feet, but in order to build the present mill in its present shape & size it was necessary to remove the shop, and they did remove it.

In the condition in which they left it, it was perfectly useless and has continued so to be until the present time. The shop was used by the deaf mute as a shop for manufacturing purposes, in it he had an iron lathe, & a wooden lathe, circular saw and a good assortment of tools. He worked in the shop most of the time; was very indus-

trious. The mute brother of the defendant was unwilling to have the shop removed, and at times seemed to be quite angry about it. I know of the employees of Medbury & Aldrich using the tools of the mute brother. He was frequently annoyed by their taking his tools to work with. The property purchased by Medbury & Aldrich
281 of the defendant in the spring or month of April, 1863, appeared to be in a very dilapidated condition. The dam on the Paw Paw river was washed away. The slide or shute was also washed out. The head-gates were gone. There were two breaks in the race, one above the grist mill, & the other near the saw mill. The bulkhead to the old saw mill was washed out, & the old mill settled, in consequence of this, a foot or more.

The machinery & wheels of the mill were in a very bad condition. It was not safe to work on the railroad used to carry lumber from the mill. They have since had to rebuild it. The lumber yard was filled up with edgings, slabs, and flood-wood out of the river. The fences around the improved property were nearly all destroyed. The orchards had not had any care, not having been trimmed up, and were exposed more or less to the ravages of cattle. Many of the shade trees set out by the defendant were destroyed. All the buildings were run down & very much dilapidated.

While Medbury & Aldrich, or their assigns, owned the property they took off large quantities of saleable sawing timber; the greatest bulk of it was pine timber.

The most of the logs used for manufacturing lumber at the mill, during the time Medbury & Aldrich & their assigns, was obtained from the premises.

DANIEL C. JOHNSON.

Taken, subscribed, and sworn to before me this 22d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of Michigan.

282 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, Daniel C. Johnson, whose deposition is hereto annexed, did, at the time of the taking of the said deposition before me, as said

commissioner, reside in the town of Watervliet, Berrien county, Michigan, & more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said above entitled cause, and where said above entitled suit is now pending.

I further certify, that no one appeared on the part & behalf of the said complainants, & that no notice was given to said complainants, or any solicitor or counsel of said complainants, for the reason that said complainants, & each of them, & the solicitor & counsel of said complainants, resided more than one hundred miles from the said town of Watervliet, where said deposition was taken.

I further certify, that on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of the said defendant, and who appeared before me on behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness, by me first carefully examined, and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness & myself, and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
Commissioner of the Circuit Court of the United States in and for the Western District of the State of Michigan.

[5-ct. int. rev. stamp, cancelled.]

283 UNITED STATES OF AMERICA:
Western District of Michigan, ss:

Be it remembered, that on this twenty-third day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States.'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United

States," passed September 24th, 1789, did cause to appear before me, at my office, in the village of Watervliet, in the western district of of Michigan aforesaid, Jonathan W. Haynes to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens & Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commisioner.

And the said Jonathan W. Haynes, being about the age of thirty-four years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said Jonathan W. Haynes, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Jonathan W. Haynes; I am thirty-four years of age & upwards; I reside in Watervleit, Berrien county, State of Michigan. I have lived there most of the time since the winter of 1854 & 1855. I was acquainted with the mill property sold by the defendant to Medbery & Aldrich. I know a saw mill erected by them upon a portion of the property purchased by them of defendant. The mill is sixty feet long and sixty feet wide. I recollect an old saw mill standing on the south side of Mill Creek race, and in November or December they were using this old mill, I think, for sharpening piles. The old mill aforesaid was afterwards torn down. It was torn down for the purpose of erecting a new mill there, or near there.

284 The new mill was built below the old mill. I should say it was not necessary to tear down this old mill in order to build the new mill as it is in its present position, shape, & size. The present mill, as built by Medbery & Aldrich, stands considerably below the old mill that was torn down by them. I recollect that a workshop, used & occupied by the mute brother of the defendant, stood on the south side of the Mill Creek race. The mute brother had in that workshop machinery & tools. He had two turning lathes, one for wood & one for iron; a grind stone propelled by water, also a circle or rotary saw, & a fine assortment of tools; I have often seen his tools, they were very extra tools. I am by occupation a carpenter & joiner. There was a great deal of turning done in the shop. He made some wagons. He turned for chairs, & did turning generally. The lathes were propelled by water. He was a sober, steady, industrious working man. He used that shop for the purpose of gaining a livelihood. I know no other means which he had of obtaining a livelihood. The water used for this shop was taken from the Mill Creek race.

That shop was moved from its foundation while Medbury & Aldrich occupied the premises. It was carried away from the bank of the Mill Creek race, from seven to twelve feet. The foundations on which it rested were torn up & destroyed. The building was left in a reckless condition, it was not leveled up. It stands leaning over conside-

rable. In its present condition, nor as it has been since it was removed, could it be used as a workshop, as it was used before it was removed. Since the destruction of the shop the mute brother has had no fixed permanent place of business. Part of the machinery that in his workshop was taken out of the shop & removed into a building that was built for a foundry. That building was subsequently burned; we saved part of the machinery. Since that time the machinery saved from the foundry has been kept in a barn, and part of it now stands out of doors. I do not know of my own knowl-
285 edge what became of his tools, since the destruction of the shop. I know of his doing nothing save a few small jobs, but not enough to earn a living.

He is an old man; I should say about sixty years. He was a splendid workman. With his shop, tools, and machinery, & his ability & habits of working he could have earned, & did earn a good livelihood. The shop, as it stood on the race, was well located & well fitted for his business. I saw the bulkhead of the mill built by Medbury & Aldrich while it was being built. I worked on the mill very soon after the water was let on to the bulkhead; the bulkhead was washed out, causing the mill to settle. The mill settled at the northeast corner, and is so at the present time. I have been by the mill frequently since that time, & have worked in the mill considerably this summer. There has been a great deal of trouble & difficulty with the bulkhead since it was built. It has to be repaired constantly. In my opinion the bulkhead was not properly constructed. It was not properly constructed, having reference to its strength & durability for the size of the mill. In my opinion it was a dangerous bulkhead for the mill; it was liable to be washed away. The fact that it was washed away shows that it was not properly constructed. I have worked a good deal for the past nine or ten years in repairing mills, and am somewhat familiar with the character of bulkheads. The condition of the mill property & the premises adjoining it, being the same sold by the defendant to Medbury & Aldrich, was in a very bad condition in April, 1863. The dam carried away; some of the gates were washed away. There was two large breaks in the race, one above the grist mill & the other above the saw mill. The bulkhead to the old saw mill, standing on the north side of Mill Creek race, being the same to which the new mill built by Medbury & Aldrich is attached, was destroyed. The railroad on which the lumber was drawn from the mill was in a very dilapidated condition, also the platform. The railroad has recently been rebuilt. The water-wheels, or one of them, was in no condition to run, the other two were in a very bad condition. There was upon the property sold by the defendant, at the time it was so sold, a saw mill, grist mill, tavern,
286 or boarding house, store, partially completed, several dwelling houses, a large barn, with a shed, probably one hundred feet long, attached. So far as I know, at the time of the sale by the defendant, the whole property was in good repair.

I know something of the pineries on the land. It was generally of a good quality of pine for this region of country. Since that time

the grist mill, & barn & shed attached, have been burned up. It was a good grist mill, & did good work. The buildings, in the spring of 1863, which were included in the sale by the defendant to Medbury & Aldrich were in a very bad condition. The fences were destroyed, more or less, around the improved property. Some portion of the pine timber land have been nearly cleared of the pine timber since the sale to Medbury & Aldrich, & prior to the spring of 1863. The mute brother expressed a great deal of dissatisfaction about the destruction of his shop. He frequently expressed it to me, & also to others in my presence.

JONATHAN W. HAYNES.

Taken, subscribed, and sworn to before me, this 22d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of Michigan.

287 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act, to establish the judicial courts of United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness Jonathan W. Haynes, whose deposition is hereto annexed and taken by me, as said court commissioner, did at the time of, the taking of the said deposition by me, reside in Watervleit, Berrien county, Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of the said above entiled cause, and where the said suit is now pending.

I further certify, that no one appeared on the behalf of the said complainants, and that no notice was given to them, or either of them, or their solicitors or counsel, for the reason that said complainants and their solicitors and counsel resides more than one hundred miles from the town of Watervleit, where this deposition w s taken by me.

I further certify, that on the twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of the defendant and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading

the same to said witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.]

JOHN B. UPTON,
Cammissioner of the Circuit Court of the United States in and for the Western District of the State of Michigan.

[5 cent revenue stamp, cancelled.]

288 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Be it remembered, that on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act, to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the village of Watervleit, in the western district of Michigan aforesaid, William Brown, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said William Brown, being about the age of sixty-five years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said William Brown, and he did thereupon depose, say, and testify, as follows, to wit:

My name is William Brown. I am sixty-five years of age and upwards; I reside in Watervleit, Berrien county, Michigan. I know the defendant, Isaac N. Swain. I know the property in this town sold by Isaac N. Swain to John W. Medbery & James F. Aldrich. I have

known the mill property since December, 1854. They did not commence to erect a saw-mill the spring of 1855. It is the saw-mill which they erected in Watervleit, Michigan. The mill was completed in 1856, in the spring of the year. The mill they erected is still standing. I have measured the said mill this day, the body of the mill is sixty feet by sixty feet. I have measured it before and found it the same. There had been some talk about the size of the mill, and it was measured for curiosity. That measurement includes the
289 frame of the mill. The roof is extended over the race to the old mill; there is no connection between old mill aud new mill at the bottom. The space of eighteen feet was used for a waste wier to let off the surplus water. I also measured to-day the frame of the edging room, it is 28 and one-half feet by eighteen feet and three inches. The edging room is no part of the original frame work of the mill, it extends out on a platform. The platform is built on piles. I saw while they were driving the piles for the foundation of the mill. At the time they were driving the piles the work shop of the mute brother of the defendant stood on the south side of the mill, and I think some small part of the ground on which the present mill stands. It was called the shop of the mute bother of the defendant, and his tools and turning lathe were in it. The shop was afterwards removed down the stream in a southwesterly direction, and further from the stream than it was before, in an angling direction from the mill, and it was left standing in rather an oblique position to the stream. It was removed by direction of Medbery & Aldrich; whether they set their hands at it, or let it by the job I don't recollect. I don't recollect even hearing Medbery & Aldrich say why the shop was removed, but the object seemed to be to place the mill on its site. As they left the shop it could not be used as a shop as it could before. They left it remaining on the blocks and timbers on which they moved it, away from any water, so that he, the mute brother, could not use it for a shop. No attention was paid in moving the shop to save anything out of the basement of the shop to my knowledge. That shop was always called the shop of the mute brother of the defendant. I could not talk very well with the mute brother, but from what I could learn from him he was much dissatisfied with the taking away and destroying of it. He has not been able to use it as a water power since. He is an industrious man. Very soon after the water was let on I know there was a break in the bulkhead and the water run through, and a large hole was made under the mill. This was about the northeast corner of the sawmill built by Medbery & Aldrich. They undertook to repair it; there has
290 been trouble about it since. There has been a great deal of leakage there since the mill was built when the gates were down.

The mill property in the month of April, 1863, was in a broken up and wasteful condition. The mills were out of repair, and the water works were out of repair. The fences at this time, and also the buildings in the villege, and being the property by the defendant to Medbery & Aldrich, had been left in a neglected and wasteful condition.

The orchards have been neglected and open to the depredations of cattle a good deal. Much of the fences had been entirely destroyed. They got a good deal of timber down here and used it up. They brought in a good deal of saw logs from the land.

WM. BROWN.

Taken, subscribed, and sworn to before me, this 23d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner
for the Western District of Michigan.

291 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812. and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of th United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, William Brown, whose deposition is hereto annexed, at the time of the taking of the said deposition before me, resided in the town of Watervleit, Berrien county Michigan,, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of the said suit above entitled, and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them, and that no notice of the taking of the said deposition was given to said complainants or either of them for the reason that said complainants and each of them and their solicitors and counsel for said complainants resided more than a hunded miles from the said town of Watervleit, where said deposition was taken.

I further certify, that on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of the said defendant, and who appeared before me for and on behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and from statement after carefully reading the same to said witness subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.]

JOHN B. UPTON,
Circuit Court Commissioner of the District Court of the United States in and for the Western District of the State of Michigan.

[5 cent revenue stamp, cancelled.]

292 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Be it remembered, that on this twenty-second day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the village of Watervleit, in the western district of Michigan aforesaid, Henry R. Holland, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complaintants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said Henry R. Holland, being about the age of forty-two years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said Henry R. Holland, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Henry R. Holland, I reside in Watervleit, county of Berrien, State of Michigan. I am forty-two years of age and upwards. I know the defendant, Isaac N. Swain. I know the premises sold by the defendant to John W. Medbery & James F. Aldrich. I am particularly acquainted with the mill property sold by the defendant to said Medbery & Aldrich in 1854. I have known the property eighteen years. At the time Mr. Swain sold the property to Mr. Aldrich & Medbery, the mill north of the new mill was in

operation with two mulee saws in it, and was doing good business. The same is now standing. This mill stood on the north side of the race, but on the south south side of the river. There was also another saw mill standing about sixty feet south of the mill above de-
293 scribed, which was afterwards taken down by Medbery & Aldrich. I know the saw mill now standing, which was erected by Medbery & Aldrich after they became the purchasers of the property. It goes by the name of the new saw mill; that is the only saw mill upon the premises which they built. I was in Watervleit when they were building said saw mill. I was frequently around while the mill was being built; I was around while they were driving the piles for said mill; I frequently saw them while they were at work, and the manner in which they did their work; I know of piles being driven for the site of a saw mill in the fall of eighteen hundred and fifty-four. Martin Ruggles superintended the driving of the piles; he had the job of driving the piles, as I understood it. I understood the mill was to be one hundred and fifty by fifty feet. At that time I was working on a farm and in a blacksmith shop in Watervleit; I have been engaged in building saw mill on Mill creek, in said Watervleit, about half a mile from the mill built by Medbery & Aldrich; I commenced to build the mill in the spring of 1856; since that time I have been engaged in the mill business, and also farming and merchandising; I am still engaged in the saw mill business; I was down where they were building Medbery & Aldrich's mill, twice each week, and some times oftener, some times every day in the week; I know the mill was to be built up and down the stream, east and west. Ruggles commenced driving the piles for the foundation of the mill in the fall of 1854. The piles driven in the fall of 1854, were well driven, and were driven about as far as they could be driven. They drove piles in the fall as long as they could; they were stopped by the cold weather. The piles driven in the fall of 1854, were driven where the platform now stands, west of the new mill. The mill erected by Medbery & Aldrich stands on a small portion, if any, of the piles driven in the fall of 1854. Mr. Ruggles again commenced in the spring of 1855 to drive the piles for the mill. He commenced just above where he had driven in the fall, and drove east and up the stream called Mill creek. A great many of the piles driven
294 in the spring were poorly driven. There was an old lock adjoining the mill just spoken of by me in this deposition, I think, about twelve feet wide; that lock was on the race from the Paw Paw river, and had been used to pass boats, lumber, and logs through until Mr. Swain came to Watervleit, about eighteen hundred and forty-seven, (1847,) when Mr. Swain erected a shute or slide in the dam on the Paw Paw river, under an act of the legislature of the State of Michigan. After the shute was built, the lock was used as a waste; alongside of the lock was a mass of timbers and old rubbish covered up with quick sand. As they were driving the piles for the mill as now built, they came in contact with old timbers and rubbish that prevented them from driving the piles well. The men who were at work in driving piles for the mill, as it is now built,

stated that the piles were miserably driven; that they were not driven as they should be. The mill has settled where the piles were driven into the old timbers outside of the lock. The settling of the mill shows that the piles were not half driven. These piles are along the old lock. The lock lies on the south side of the mill I first spoke of in this deposition, and runs east and west, or nearly so. The lock lies between the mill first spoken of and the mill as built by Medbery & Aldrich, and under that portion of the last-named mill as extended over upon the first-named mill. They built the mill sixty feet square, and extended it over the lock onto the other mill. The distance between the new mill and the old mill is eighteen feet, thus making the mill, as so built, seventy-eight feet, instead of fifty feet, as I understood it was to be, north and south. If the mill had been built fifty feet north and south, I think they would have had good ground for driving the piles, and would have escaped the old timbers outside of the lock. I have driven piles for the foundation of a mill. I know how piles should be driven for the foundation of a mill, and when well driven they make a good foundation. The piles that were driven for the mill first spoken of by me in this deposition make a good foundation. I noticed the building of the bulkhead of the mill; I think the bulkhead was not
294 properly constructed. I thing the sheet piling was not properly driven; I understood from the hands, while they were at work sheet piling for the bulkhead, that if, in driving the sheet piling necessary to secure the bulkhead of the mill, they came upon any obstruction they did not remove the obstruction, but cut the piles off. The sheet piling should have been driven as far as possible to be driven, and if there is any obstruction it should be removed. The piles should be driven down closely together and well battened; the piles should be driven with great care, and should be driven perfectly straight. As it was, immediately after they let the water in, the bulkhead gave way, and many of the piles washed out, and the mill thereby settled and was greatly damaged, and remains so until the present time. The bulkhead which they, Medbery & Aldrich, put into the mill was not a proper or safe bulkhead. It has been a constant source of trouble and expense, as it has been constantly giving away. In order to repair the bulkhead, they had to the mill. The mill was not properly constructed to do the business of sawing and manufacturing lumber. It is not so handy or convenient as it might have been for a mill of its capacity. It requires a great deal of labor to remove the lumber from one carriage to another, and is very unhandy in that particular. I have measured the mill; it is sixty feet square, and is extended over, as I have before stated, that is, the roof and the floor is extended over onto the old mill, eighteen feet, making the mill building sixty by seventy-eight feet. I do not think the mill as built, is as convenient or as valuable as a mill would have been fifty feet in width and one hundred and fifty feet in length, extending up and down the river; I measured what is called the edging room; it is twenty-eight feet and six inches long, and is eighteen feet and two inches wide; it is a-

cheap temporary frame put up to cover the carriage of the edger. I do not think it forms any part of the mill building. It is just put up against the mill building. The platform is made for the purpose of carrying out lumber on from the mill, and is no part of the mill building. The condition of the property at the time of the sale, under the decree of foreclosure obtained by the defendant against Medbery & Aldrich, was very bad. The dam was gone off: the headgates were out; there were two (2) breaks in the race, and the bulkheads were gone away; there had been a large amount of pine
295 timber, valuable for lumber, cut and stripped from the land while Medbery & Aldrich and their assigns were in possession of the land and premises. I remember the old saw mill that stood on the south side of the race of Mill creek, that was torn down by Aldrich & Medbery. I think the piles for the foundation of this present mill were not driven close up to the foundation of the old mill; I know that the old mill was torn away, either in the fall of 1854 or the spring following; I do not think it was necessary to have torn down the old mill on the south side for the purpose of erecting the present mill, the one built by Medbery & Aldrich. If the mill built by Medbery & Aldrich had been one hundred and fifty feet up and down the stream, east and west, it would have been necessary to have torn down the old mill for the foundation of the new mill; at that point there was a hard bottom which would have given them a good solid foundation for a bulkhead to the mill. If the mill had been fifty feet wide by one hundred and fifty feet in length, it would not have been necessary to have removed the shop of the mute brother, but to build a mill of the size of present mill, would have rendered it necessary to have removed it. If the mill had been built one hundred and fifty feet in length instead of sixty feet, as it now is, it would have furnished a better foundation for the bulkhead than where the bulkhead now is. A bulkhead properly constructed, at this point, would have stood, I think. The foundation of the old mill always seemed to be permanent and good.

H. K. HOLLAND.

Taken, subscribed, and sworn to be me this 22nd day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of Michigan.

296 UNITED STATES OF AMERICA.
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits, and bail

in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness, Henry R. Holland. whose deposition is hereto annexed, at the time of the taking of the said deposition before me, resided in the town of Wetervleit, Berrien county, Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said suit above entitled, and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them. and that no notice of the taking of said depositions was given to said complainants, or either of them, for the reason that the said complainants, and each of them, and the solicitors and counsel of said complainants, resided more than one hundred miles from the said town of Watervleit, where said deposition was taken.

I further certify, that on the twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four. I was attended by H. M. Finch, one of the solicitors of said defendant, and who appeared before me for and on behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was, by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-second day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,

Circuit Court Commissioner of the District Court of the United States in and for the Western District of the State of Michigan.

[5-ct. rev. stamp.]

297 UNITED STATES OF AMERICA,

Western District of Michigan, ss:

Be it remembered, that on this twenty-first day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress enti-

tled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789. did cause personally to appear before me, at my office, in the village of Watervliet, in the western district of Michigan aforesaid, Burrell A. Olney, to testify and the truth to say, on the part and behalf of the defendant, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catherine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said Burrell A. Olney, being about the age of fifty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said Burrell A. Olney, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Burrell A. Olney; I am fifty-two years of age and upwards; I reside in the township of Watervliet, county of Berrien, and State of Michigan. It is one hundred and seventy-five miles from this place to the city of Milwaukee, State of Wisconsin, by the ordinarily traveled route.

I am acquainted with the defendant in this suit, Isaac N. Swain.

I know John W. Medbury and James F. Aldrich. I know the fact of their having purchased property of the defendant, Isaac N. Swain, in Watervliet aforesaid. The property they so purchased consisted of real estate, I think one thousand and fourteen acres of land, a grist mill and saw mill, boarding-house, store, five or six dwelling houses, barn, sheds, and water power The grist mill and saw mill were in running order. There was a large amount of pine and white oak timber on the land. They took possession of
298 the said land and mills, and worked the same. I know the site of the new saw mill which the said Medbury & Aldrich built on a part of the land they bought of the said Swaine. I did not see the said saw mill to examine it while they were building it. I have seen the said mill since it was built. I have measured the mill since it was built. I measured it with a ten foot pole. I made the measurement on the twenty-first day of June, 1864. I have measured it three or four times in all. I measured it once for the purpose of having it insured. The mill is sixty feet in length and sixty feet in breadth. That is the size of the mill building proper. The mill fronts up stream. The water in the tail race runs in from the east, and runs to the west. The lumber made in the mill is run out to the west from the mill. I know where the northeast corner of the mill built by Medbury & Aldrich is. The said northeast corner of said mill has settled. I

should think it has settled seven inches. In my opinion, the cause of the settling of the mill was a break above and under the mill; I mean by above the mill, up ~~to~~ the stream. Since the building of the mill there was a break in the flume, and the water from the flume rushed under northeast corner of said mill and caused it to settle. In my younger days I used to tend saw mills, and helped repair them. In my younger days I worked about one year in saw mills. During six or seven years, while Mr. Swain owned the property, I was intimately acquainted with it. I was familiar with this water power. I have examined the bulkhead connected with and about the saw mill which Medbury & Aldrich built. The bulkhead was made by driving piles on the south side of the flumes, and the piles planked on the inside and outside. Next to the mill the piles are driven solidly for a little distance. There are nine piles driven solidly; they are too small, being only eight by nine inches in size. Then they continue up the stream, at an average distance of five feet or thereabouts, and are too small for the large embankment that is filled against them. There is a large embankment of earth piled upon the outside of them which has caused them to continually settle into the flume, and they still continue to settle. The effect of this settling is, that the
299 dirt of the embankment slides into the flume, and the sliding in of the dirt causes the plank to pull apart in some places more than in others, and causes the embankment to wash out and settle. When the dirt falls into the flume it compels us to stop the mill to repair the break and to clean out the dirt. Within one year I have been compelled to draw off the water and repair the flume many times. This has been caused by the breaking away of the sides and the settling of the bottom of the flume. This would cause the water to set back behind the planking of the flume and the bank. The bulkhead to the saw mill, as built by Medbury and Aldrich, having reference to its strength and durability, is, in my opinion, imperfect and dangerous. It, the bulkhead, is built by laying mud sills upon the earth in the bottom of the flume. I think the plank in the bottom of the flume are twelve or fourteen feet long. They are supported under the center in two places by mudsill, and also at the ends, and are pinned down upon the mudsills. I consider them imperfect and dangerous, for the reason that the mudsills settle more in some places than in others, and that causes the plank to draw apart and the flume leaks. Some parts of the flume, from settling, are one foot and a half lower than others. We frequently have to shut down the mill and repair the flume when it gets to leaking. To make a good flume on that stream and for that mill, it cannot be done in any other way unless with stone, which are not to be had here. It must be piled with large piles, driven sufficiently deep, in rows, to lay the mudsills upon, and then filled and planked over. If this flume had been so constructed we should have no trouble to shut off the water to repair the flume. The flume of which I have been speaking, that we have repaired so often, is the one repaired by Medbury & Aldrich. I was not present when they built the original flume. I speak of the flume as I found it after they had so

repaired it. Owing to the bad construction of the flume the water washed through the bottom of the flume, and went under the mill, and caused the northeast corner of the mill to settle about seven inches. The flume never was wide enough at the upper end to let in water sufficient to run the mill properly and up to its capacity.

I have measured the edging room of the mill built on a
300 platform on the west side of the mill, and it is eighteen feet by twenty-eight and one half feet. The frame of the edging room is about eight feet high, and is made of studs and clapboards. It is no part of the saw mill building, but is attached to it. The platform on the west side of the saw mill is nop art of the building. That platform is no more essential or necessary to that saw mill building than all platforms are to all saw mill buildings. No part of the platform is now enclosed, nor was, except where the edging room stands. All saw mills have a platform or dock, or board way for convenience in pilling away lumber. These platforms are not any part of saw mills proper, and are not so considered. The platform is a double platform. The foundation of the platform is not properly laid for the foundation of a saw mill building. There is no machinery of the saw mill upon that platform, except a small edging saw, and that is in the small building or addition of which I have spoken. The edgng saw is run by a belt from the main shaft of the mill. I know a shop that stood upon the race bank where the mill now stands, and occupied by a mute brother of the defendant. I should say that the building was about twenty-five by thirty-five feet. I know about the time the defendant sold the property to Medbury & Aldrich the shop was standing on the bank when the sale was made to Medbury & Aldrich. I heard a conversation between Medbury and the defendant in relation to that shop being occupied by the said mute brother of the defendant, and the use of the water power. It was agreed and understood between them that the mute brother should have the privilege of using it, the shop, and the water power necessary to run it, as long as he wanted it; and after he, the mute brother, got through with it, it shouldgo to Medbury & Aldrich. The shop is down the stream now, and away from the race bank, from where it stood when the mute brother used it, and when Medbury & Aldrich bought the mill, about six rods. It is partly turned up on one end and entirely useless. It was moved to where it now is, and in its present condition when Medbury & Aldrich commenced to build the present mill. It was necessary to remove the shop in order to build the present mill where it now stands, and as it now stands. If the present saw mill had been built according to the terms of the agreement of sale it would not have been necessary to have removed that shop.

301 The shop was occupied by the mute brother, at the time of the sale to Medbury & Aldrich, for manufacturing and turning. He had a turning lathe in the shop, and a very nice assortment of tools. He worked in the shop. That was his profession, and in that way he got his living. Since the removal of the shop from the race bank it has not been in any condition to work in, and the mute brother has not had any place to work in since. I am now in-

terested in this property. At the time of the sale, under the decree of foreclosure obtained by the defendant upon the mortgage executed by Medbury and wife, and Aldrich and wife, to the defendant, I purchased one-third interest in the property covered by that mortgage. Before the sale upon said decree, there was an agreement between myself, Mr. Fisher, and the defendant, that on the sale we would bid up to twenty thousand dollars for the property, and no more. We further agreed that if any person bid more, that he should take the property. Mr. Swain said that if any person bid higher than twenty thousand dollars, he might take the property, and he, Swain, would collect the balance due on said decree out of the Milwaukee mortgage. The property was sold by the circuit court commissioner for the county of Berrien, on the fifteenth day of April, 1863, I think. At the sale there were two parties, who, I learned, were from Milwaukee. I was introduced to one by the name of Hayt, and the name of the other was, I think, Whaling. Hayt bid at that sale. I was informed by Mr. Hayt that he had seen the property. The sale was postponed once, as I learned, and at the request of the Milwaukee parties. Mr. Hayt bid nineteen thousand and five hundred dollars, I think, for the property. There was no hindrance to any person bidding just what he saw fit to bid. The bidding at the sale was in all respects fair and open. Since the sale to Medbury & Aldrich there has been a large amount of timber cut and taken from the premises. One barn and shed, part of the property sold to Medbury & Aldrich, were burned since they bought the properry. The shed was a large shed, built like a railroad wood shed.

At the time of the sale under the foreclosure decree of the defendant, the large dam across the Paw Paw river was entirely destroyed, and had to be rebuilt at a very large expense. The head gates
302 to the race, which were the safety valve to the whole mill property, were entirely out, and had to be rebuilt. The water power cannot be used without them with safety. The waste wier of the race, as he, Swain, sold it to Medbury & Aldrich, had been filled up with earth; the race bank was entirely washed away east of the grist mill; at the bottom of the break it was eighty feet. Around the bulkhead, at the north side of the old saw mill, there was a space washed out forty (40) feet wide and thirteen feet deep, and the bulkhead above the old saw mill was washed under eleven feet deep, and the saw mill, were entirely out of repair in every respect. Where there was any strain or rub we had to make it anew. The railroad on which the lumber is carried from the mill was entirely worthless, and had to be built anew. When I commenced to run the mill I piled the lumber on the top of the platform, and a beam one foot square that was framed into the southwest corner post of the new part of the old saw mill, broke down. Both bridges across the race were out of repair, and one had to be built anew last year. The flume to the grist mill had to be dug up to the depth of eight feet, about half of the length of it, and planked anew on the inside and outside, and refilled with earth. When I purchased an interest in the property, the fences around the improved lands were open to the commons, and were being destroyed.

At the time of the sale by the defendant to Medbury & Aldrich, there were three fine orchards on the premises. All the buildings were badly out of repair. The property had, for a long time before I purchased it, been going to destruction. It had been stripped and the property wasted. The taxes on the property have not been properly kept up and paid. I know that part of the lands have been sold for taxes. Since the sale upon the decree I have assisted in paying taxes in arrears upon the property. There are now forty-eight acres of land, being part of the premises, that are now deeded to the parties who bid them off at the tax sale. I know that parties claiming under the tax deed have stripped the land of pine timber, and there was a good deal of pine timber on the land.

I knew that the mute brother of the defendant was able to earn his livelihood by the said shop and machinery, with the use of the water power. The mute brother, since the destruction of the said shop, has not had a fixed permanent place of business. I do not know that the mute brother has had any means of obtaining a
203 livelihood for himself since his shop was destroyed. He has frequently been low spirited and discontented, and threatened to leave. He exhibited much feeling about the destruction of his shop. He would show, by signs, how the shop was destroyed, and his disapprobation of its destruction. He seemed to feel sorrowful and down-hearted about the destruction of the shop. He was a hard-working, industrious, ingenious, and intelligent man, for a man that was deaf and dumb. I generally found him diligently at work at his shop. He seemed to be proud of his shop and machinery. He was perfectly at home and contented in his shop. While he could use his shop he seemed contented and happy; did not seem discontented. Since that time he has not been able to do anything for a livelihood except small jobs. He cannot stand it to work out of doors. Since the destruction of the shop I know, of my own knowledge, of the defendant furnishing his mute brother with the means of living. I know that he has furnished him with a house to live in. I know that the defendant has furnished the house. The furniture is good and comfortable. The house is well furnished in general.

Since the destruction of the shop the defendant has told me, at different times, to furnish his aged mother, mute sister, and mute brother with everything necessary to have, and to not let them want for anything. In pursuance of those directions and instructions, I have done so. I was acting as agent for the defendant in that and other matters, and am at the present time; I furnish them what is necessary. The company have a store here, and I am a member of the firm. They draw supplies and money from the store, which is charged to the defendant, and this is done by the direction of the defendant, and the defendant settles with the company for it.

BURRILL A. OLNEY.

Sworn, subscribed, and taken before me, this 23d day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of Michigan.

304 UNITED STATES OF AMERICA,
Western District of Michigan ss:

I, John B. Upton, a commissioner, duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, Burrill A. Olney, whose deposition is hereto annexed, at the time of the taking of said deposition before me, resided at Watervleit, Berrien county, State of Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of the above-entitled suit, and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them, and that no notice of the taking of said deposition was given to the said complainant, or either of them, or to their counsel or solicitors, or either of them, for the reason that the said complainants, and each of them, and their solicitors and counsel, and each of them, resided more than one hundred miles from said Watervleit where said deposition was taken.

I further certify, that on the twenty-first day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors for the defendant, and who appears before me on the part and behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and myself, and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand this twenty-first day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
United States Circuit Court Commissioner of the District Court in and for the Western District of the State of Michigan.

[5 cent revenue stamp, cancelled.]

305 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Be it remembered, that on this twenty-fourth day of June, in the year one thousand eight hundred and sixty-four, I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the village of Paw-paw, in the western district of Michigan aforesaid, Martin Ruggles, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

JOHN B. UPTON,
Commissioner.

And the said Martin Ruggles, being about the age of forty-one years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said Martin Ruggles, and he did thereupon depose, say, and testify, as follows, to wit:

My name is Martin Ruggles; my age is forty-one years of age and upwards. I reside in Paw-paw, Van Buren county, State of Michigan. Paw-paw, aforesaid, is more than one hundred miles from the city of Milwaukee, State of Wisconsin. I resided in Hartford, Van Buren county, State of Michigan, in the years 1854 and 1855. I know the saw-mill property at Watervleit, county of Berrien, State of Michigan, sold by the defendant to John W. Medbury & James F. Aldrich. I knew the same property in 1854 and 1855, and had been for several years before. I am perfectly familiar with the said property. The general condition was good. It was in a good state of repair. I recollect an old saw mill standing on the south side of Mill Creek race, in Watervleit. I contracted, in the fall of 1854,
306 to drive the piles for the foundation of a saw mill, to be built by Medbury & Aldrich, in Watervleit. It was to be built on a portion of the property sold by defendant to Medbury & Aldrich. There was also a saw mill on the north side of Mill creek, sold in Watervleit. I recollect a shop, occupied by amute brother of the defendant, standing on the same side of the race on which the old saw mill, sold by defendant to Medbury & Aldich, stood. The shop stood south of, and a little below the old saw mill, and to the west. The water was carried from the old saw mill to the shop by a trunk; that was

the only means of supplying this shop with water. I should think it is almost eighty feet, or perhaps a little more than that, from the shop to the mill, standing on the north side of the Mill Creek race. I recollect of an old lock being on the south side of the saw mill, standing on the north side of Mill Creek race in Watervleit. This old lock was formerly used for passing boats, logs, and lumber through. I have seen many boats pass through it. The lock was about twelve or fourteen feet wide. The distance between the old lock and the shop spoken of was about sixty feet. It was the intention of the parties, as I understood it, to build a saw mill. The saw mill was to be fifty feet wide north and south, and one hundred and fifty feet in length east and west. I contracted to drive the piles for the foundation of a saw mill of that size. There was space enough south of the lock to have built a mill fifty feet wide without interfering with the shop of the mute brother. I was directed, in the fall of 1854, to drive the piles for the foundation of a mill, to be one hundred and fifty feet in length. I drove the piles for the west end of the foundation of the mill first. It was in the fall of 1854 that I drove these piles. If the foundation for a mill one hundred and fifty feet long had been continued to the east, it would have passed on to the foundation of the old mill. The old mill was removed to make way for the foundation of the new mill. The soil under the old mill was clay, especially at the upper portion of the mill. At that point they could have had a good solid foundation for a bulkhead. If the piles had been driven up the stream one
307 hundred and fifty feet from the point where I commenced driving them in the fall of 1854, and upon the original plan, it would not have interfered with the shop of the mute brother of the defendant. I continued to drive the piles for the foundation of the mill until cold weather drove me off, and I drove the piles well. I used the old saw mill on the south side of the race for the purpose of sawing and sharpening piles. Some of the piles were large, and had to be made smaller, so as to go in between the gins of the pile driver. I know the fact that the old saw mill, standing on the south side of the Mill Creek race, was torn down for the purpose of building the saw mill fifty by one hundred and fifty feet. The old mill was torn down in the fall of 1854. While the mill stood I drove piles by water from the flume of the old mill. When the mill was torn down I used a horse to drive piles, in the latter part of the fall of 1854. I recollect the fact that the defendant left Watervleit about the first of April, 1855, for the east. The defendant was not around, and gave no directions about driving piles in the spring of 1855. I was at Watervleit nearly all of the spring and summer of 1855. I don't re- (~~piles north of the line of my old contract, beginning at, near, or on to~~) collect of seeing the defendant during the spring and summer of 1855, after he left for the east. The defendant did not at any time, to my knowledge, intertere with the driving of the piles. He may have been around in the fall of 1854, but gave no orders nor directions, and made no suggestions as to the driving of the piles. I worked, in the spring of 1855, at Watervleit, for Medbury & Aldrich, driving

piles. There was a change made in the spring in the shape and size of the mill. I think I went on in the spring and drove piles for a time on my contract. I think I drove right along for three or four weeks, in the spring of 1855, before I heard any talk about the change of the plan of the mill. I think I could not have begun to drive the piles till late in the spring, on account of the spring freshets. I think I commenced in the latter part of April. As I have said, after I had driven three or four weeks, a change was proposed in the plan and size of the mill. A Mr. Stewart came there, and became, or seemed to be interested in some way in the business
308 with Medbury & Aldrich. They then proposed a change in the size and plan of the mill, and wished me to drive a line of the foundation of the old lock. I declined doing so, because I was satisfied that there were old fly-timbers in the way, and I could not drive them successfully. They then wished me to waive driving the piles in the old contract as aforesaid, saying that they wanted this line driven, and did not want them driven as first arranged. I consented to waive my contract, but did not agree to drive the piles as they wished me to do. They did not want the piles driven to the east, but further to the north. Owing to the character of the foundation I could not have driven the piles properly, I think, in pursuance with the terms of my contract, and I declined to drive the piles as they wanted me to do on the change of plan. I think it would have been impossible to drive the piles well at that point, unless the piles had steel or iron points, on account of the timber in the bottom of the old lock yet remaining there and imbedded in the sand. They did not want me to drive any more under the old contract, and I therefore abandoned the contract. In consequence of the change made in the shape and plan of the mill, and my refusal to drive the piles as they requested on my contract, they took the work of driving the piles with their own hands, and I went to work on my farm at Hartford, in Van Buren county. I remained there about three weeks, and they then came to me and asked me to go and assist them in driving the piles by the day. I went, and found that they had driven but very few piles in my absence. I commenced to drive piles for them, and under their directions. The piles driven by the day and under their directions were very poorly driven. I should not consider them one-quarter properly driven; indeed, I did not consider them worth anything for the foundation for a mill. I never saw such sham work in my life. The piles were not long, and when driven so as to meet with any obstruction or other foundation, driving was discontinued on them; and in thus driving them, I drove as many as six or seven in half a day, while under the contract I had for driving them, to drive them properly I could drive only about one and a half a day.

309 The piles were not driven at all as I did under the contract, or as I would have driven had I been driving them under the contract. I was merely an employee. I did not assume any responsibility in the matter. While this work was progressing I told them that it was good for nothing for that purpose. I frequently stated to

them that the work was good for nothing. The other employees also stated the same thing among themselves, and it was the general opinion that it was bad work; they so expressed themselves while they were at work.

One reason assigned by the parties in interest for the change in the saw mill was that it would be cheaper, and answer their purpose as well, and that they would get to sawing sooner. The size of the mill as changed and finally built was sixty feet square on the foundation, and then the roof and floor were extended over on to the old mill, standing on the north side of the race, and this made the mill on the floor surface sixty by seventy-eight feet.

After the proposed change was made, they moved the shop of the mute brother of the defendant; they removed it as they would other buildings, to get it out of the way. They moved the upper part off the basement first; they left the shop on blocks, and inclining. It was not left in a condition so that the mute brother of the defendant could use it as a shop as he had done. It was so removed that it cut off his entire water communication. I know the fact that the mute brother complained a great deal about his tools being taken, and being damaged by the employees of Medbury & Aldrich.

I was there when the bulkhead of the mill was constructed. The foundation for the bulkhead was very poor; the foundation of the bulkhead was quicksand. Had they built the bulkhead where it would have been—had the mill been carried up one hundred and fifty feet east and west, they would have got a better foundation for a bulkhead. The bulkhead, as constructed, was made by driving sheet piles into the quicksaud. I think it was not well puddled with clay, as it should have been, to secure it. That bulkhead, as constructed by Medbury & Aldrich, was not strong or durable for the pur-
310 pose for which it was constructed. It was an imperfect and unsafe bulkhead for a mill of that capacity. I know that soon after it was built it went out. It went out soon after the water was let on to it. It went out at the northeast corner of the mill, and near the foundation of the old lock and caused the mill to settle. In my opinion the mill, as originally planned to be built, fifty by one hundred and fifty feet in size, would have been far more profitable and valuable than the one they did put up. It would have been more valuable and better for the reason: first, the foundation would have been better, and would have furnished a better place to build a bulkhead. In the next place, it would have been a more convenient mill; it would have cost a good deal more to have built it properly, say one-third more; it would have cost less to run it after it was built. The said mill, as finally built, was only partially on the piles I drove in 1854, and partially on the piles I drove in the spring of 1855, and also on those I drove when I was at work by the day under the direction of Medbury & Aldrich, as hereinbefore stated, and also on some they drove themselves while I was at home. In my opinion a saw mill of the dimensions of fifty by one hundred and fifty feet, built and erected upon the same premises, and upon the foundation commenced in the fall of 1854 by driving piles, would have admitted of

the construction of a more substantial, safe, and tight bulkhead, and of better railway facilities for passing logs and timber through the length of the mill, from saw carriage to saw carriage, and there to be manufactured into lumber, out of the mill into the lumber yard for market, than would the mill as erected by Medbury & Aldrich, for the reason that it would have run the mill higher up the stream and avoided the lock, and by going further up stream would have secured a better bulkhead, and also the lumber would have passed through the mill lengthwise, instead of going sidewise and angling, as it now does. If the mill had been built fifty by one hundred and fifty feet, instead of sixty feet square, it would not have necessitated the removal of the shop of the deaf and dumb brother of the defendant.

311 I have been engaged somewhat extensively in driving piles for mill foundations and for bridges. I have assisted more or less since I was twenty-one years old in building and repairing as a mechanic, and have had a good deal of experience in putting in bulkheads. I am now county clerk of Van Buren county, and State of Michigan. I am now holding my second term of office. The platform does not form any part of the building. I recollect the edging building adjoining the mill. It was no part of the mill, but was attached to the mill building after the mill building was erected. I know the deaf and dumb brother of the defendant. He was an excellent workman. He had nice good tools in the shop. He had lathes and circle saw; grindstone, propelled by water; and think I recollect a boring machine. He was using the shop and running the machinery when Medbury & Aldrich bought the property of defendant, and up to the time they tore away the old mill and destroyed the water connection to his shop, and he worked in the shop with his tools after the water connection was destroyed. He has not been able to work in the shop since it was removed. He was a very steady, sober, and industrious man. He seemed to be very much dissatisfied about the destruction of his shop.

MARTIN RUGGLES.

Taken, subscribed, and sworn to before me, this 21th day of June, 1864.

JOHN B. UPTON,
United States Circuit Court Commissioner for the Western District of Michigan.

312 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, John B. Upton, a commissioner duly appointed by the circuit court of the United States for the western district of Michigan, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March

1st, 1817, and the act entiled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the and the fact is, that the witness, Martin Ruggles, whose deposition is hereto annexed, at the time of the taking of said deposition resided in the village of Paw Paw, Van Buren county, State of Michigan, and more than one hundred miles from the city of Milwaukee, in the State of Wisconsin, the place of trial of said above-entitled suit, and where said suit is now pending.

I further certify, that no one appeared on the part of the said complainants, or either of them, and that no notice of the taking of said deposition was given to said complainants, or either of them, or their solicitors or counsel, or either of them, for the reason that the said complainants and their counsel resided more than one hundred miles from the village of Paw Paw aforesaid, where said deposition was taken.

I further certify, that on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by H. M. Finch, one of the solicitors of said defendant, and who appeared before me, for and on behalf of the said defendant, and by the said witness, who was of sound mind and lawful age, and the said witness, by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing in the presence of the said witness and myself; and after carefully reading the same to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my hand, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.] JOHN B. UPTON,
Circuit Court Commissioner of the District Court of the United States in and for the Western District of the State of Michigan.

[5-cent revenue stamp, cancelled.]

313 UNITED STATES COURT.

In the circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN. } In equity.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac N. Swain, of Detroit, Michigan, having been by me duly

sworn, says, that he is the defendant in the above-entitled cause, that he is informed and verily believes that the testimony of Sebastian Smith, of Watervliet, Berrien county, in the State of Michigan, is material and necessary for the said defendant in the defence of said cause, that the said Sebastian Smith resides more than one hundred miles from the place where the court, at which this deponant expects the said cause will be tried, is appointed by law to be held. And this deponent further says, that he is informed and believes, that said complainants, and their attorneys and solicitors, reside at Milwaukee, in the State of Wisconsin, over a hundred miles distant from where said witness resides, and from the place where the examination of the said witness expected to be taken.

ISAAC N. SWAIN.

Sworn to and subscribed before me, on this twenty-seventh day of June, A. D. 1864.

ADDISON MANDALL,
U. S. Commissioner for Eastern District of Michigan.

[5 cent revenue stamp.]

Let Sebastian Smith, the witness named in the above affidavit of Isaac N. Swain be examined, de bene esse, before me accordingly, at my office, at the city of Detroit, in the State and eastern district of Michigan, on the twenty-seventh day of June, A. D. 1864, at two o'clock, p. m.

ADDISON MANDEL,
United States Commissioner for Eastern District of Michigan.

314 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Be it remembered, that on this twenty-seventh day of June, in the year one thousand eight hundred and sixty-four, I, Addison Mandell, a commissioner duly appointed by the circuit court of the United States for the eastern district of Michigan, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did cause personally to appear before me, at my office, in the city of Detroit, in the eastern district of Michigan aforesaid, Sebastian Smith, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the district of Wisconsin, in equity, at Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

And the said Sebastian Smith, being about the age of thirty-eight years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, I carefully examined the said Sebastian Smith, and he did thereupon depose, say, and testify, as follows, to wit:

That he resides in the township of Watervliet, in the county of Berrien, and State of Michigan, that he is now a farmer, and has been such for the last four years, that he does not know the complainants in this suit, but has been acquainted with the defendant, Isaac N. Swain, since about the first day of December, A.D. eighteen hnndred and fifty-four, that previous to that time deponant had been in the employment of the firm of Medbury and Aldrich, at Chicago, then engaged in the lumber business at said Chicago; that at the request of said firm, deponent went to the village of Watervliet, in said Berrien county, to engage in their employment. He was first engaged for them in shipping lumber, next as clerk in their store at said Watervliet, and afterwards engaged in the lumbering bu-
315 siness for said firm at said Watervliet, that he remained in their employment nearly two years, and a portion of the time he had the charge and management of their saw mills at that place. That he knew the mill property and lands at said Watervliet, conveyed by said defendant to said Medbury and Aldrich, of which said firm was in possession when deponent came to Watervleit as aforesaid; that he knows that of the property purchased by said firm of said defendant, there was a large quantity of pine and other timbered lands. There was a large double saw mill upon the property, situated upon the north side of the main race, about forty feet in width, by about one hundred and ten feet long. There was, immediately south of and adjoining said main race, another race called the Mill Creek mill race, upon which was another saw mill called the old saw mill, of about the size of twenty-two feet in width by about forty eight feet in length. That immediately below said old saw mill, and a little south and west of it, was a shop-building and waterpower connected with it, supplied from the flume of the old saw mill and conveyed to it in a trunk; that said shop was occupied and carried on by Russell Swain, a deaf and dumb brother of said brother of said defendant, and was some twenty-four ~~feet~~ by thirty feet in size. That there was a space of about seventy-five feet between said double saw mill and the northeast corner of said shop, which was the nearest corner to it. That there was also a large grist mill upon said property upon said main race, and also a large store building and a tavern building, a large basement barn, and a shed adjoining, about one hundred feet long, two boarding houses and some five other dwelling houses with their out-buildings. Also three fine orchards, producing excellent fruit, of various kinds, also large improvements of improved land, with fences, &c., that every thing was in good order and condition. That when deponent first arrived at said Watervliet, said Medbury and Aldrich were working upon the foundation for a new saw mill, situated between said double saw mill and said shop; on the south side of said double mill, there-

316 was an old lock for letting through lumber, logs, boats, &c., which was then used for the purpose of wasting water through, that there was room enough between said old lock, (which would not admit of piling,) and said shop, for a mill fifty feet in width, to lay a good foundation by piling; that when deponent arrived there they were driving piles for the foundation of said saw mill. Martin Ruggles had the contract for driving the piles for said new mill, and was engaged at the west end of the foundation for said new mill; that the said old saw mill was taken down and removed for the purpose of extending said new mill upon its foundations; that it was about one hundred and fifty feet from said west end, where they commenced driving piles, up to the location of the old mill that was taken down; that had a mill of the dimensions of fifty feet in width by one hundred and fifty feet long, running east and west, been placed upon a foundation commencing where they were driving piles, and extending to the foundation of said old mill, it would have extended to solid ground well adapted for the construction of a safe and secure bulkhead. That said Ruggles drove only a portion of the piles for said foundation that fall, and stopped driving when cold weather came on, intending to resume in the spring following, and did commence again in the spring following, as early as the weather and the water would permit, and was operating upon the same plan for a foundation that he was working upon in the fall; that he was driving piles there in the month of May, eighteen hundred and fifty-five; that in the month of June of that year, one Jonathan S. Stewart came to Watervliet and became a partner with Medbury and Aldrich, in the mercantile and lumbering business at said Watervliet, under the firm name of Medbury, Aldrich and Stewart; that it was about this time that a change took place in the plan for the size, shape, and location of said new mill and a saw mill of the size of sixty feet square was adopted, instead of the old plan, and the main floor and the roof were extended over the old lock on to the said double saw mill which was on the property when it was bought of defendant by said Medbury and Adlrich. Said extension was eighteen feet by sixty feet, thus making the mill building as thus enclosed and
317 roofed, of the dimensions of sixty by seventy-eight feet, the longest way north and south; that by this change it became necessary to extend the foundation for the new mill ten feet further south than the original foundation, as commenced by driving piles the fall before, which change interfered with the location of said deaf mute's shop about five or six feet, whereupon to make room for said new foundation. Said shop was removed from its foundation and moved off in a southwestern direction some five or six rods, and there left without any water connection, or any convenience of getting water to it, and there left in a wrecked and ruined condition, where it remains to the present time; that the basement, water wheel, flume, and trunk of said shop were destoyed, and the same were rendered utterly valueless to said deaf mute; that said shop was evidently moved in a manner to injure and destroy it, and deponant heard said proprietors, or some of them, say that they did not intend

to have the same fitted up or supplied with water; that there was evidently a desire manifested to place said shop in such a condition as to destroy it, and to remove it from the advantages of a water connection, which was its principal value, and which was the principal source of livelihood of said Russell Swain; that as said new mill was constructed, it was only necessary to remove said shop about eight feet, and its water power could easily have been restored for its use; that said Russell Swain objected to his shop being thus removed, and frequently and for years complained of the injury done him in consequence of its removal, and was very solicitous that they should restore his shop to its former condition to enable him to gain his livelihood. That said Russel Swain had in his shop, propelled by water power, lathes and other machinery, and tools to carry on his business; that said Russel Swain, although a deaf mute, was a very ingenious mechanic, and a hard working industrious man, spending most of his time at his trade in his shop, and that after his shop was removed and destroyed as aforesaid, he was thrown out of employment, except occasionally doing such small jobs as he could get, and his principal source of livelihood was gone, and that since that time he has been dependent upon his brother, this defendant, for
318 the means of support, while before said shop was destroyed, he was enabled to gain a good livelihood from its use.

That after the plan of said saw mill was changed, in the year eighteen hundred and fifty-five, said Ruggles gave up his contract for driving the piles for said foundation as first agreed upon, but subsequently worked for said firm in driving piles for the foundation as changed, by the day, and under their direction; that the piles so driven were not well driven, and not sufficient for any saw mill, that they were slightly and not thoroughly driven; that the new mill as finally built was not so located as to have a good and secure bulkhead; that the foundation was bad, was in quick-sand and difficult to construct securely, whereas, if the new mill had been built upon the foundation orignally intended, and of the size of fifty by one hundred and fifty feet, it would have had a good and safe foundation for its bulkhead; that the bulkhead, as built, was put in a bad place, and badly built; that deponent aided in its construction and under the express direction of John W. Medbery himself, one of said firm; the piles were not well driven, and they were not puddled properly; that soon after the water was let on, the bulkhead gave way, the mill was undermined and settled, and settled considerably at the northeast corner, throwing the machinery out of line, and it has never been restored in its foundation; that said bulkhead was subsequently repaired, but it is in an insecure and unsafe condition and has ever been a constant source of danger and anxiety to its proprietors; all which could have been averted, had said bulkhead been located as originally intended as aforesaid, and properly built. That deponent was paid for his services, by said firm, at the rate of seven hundred and fifty dollars a year and his board, while he remained with them; that deponent has had experience in building mills upon foundations of a similar character, having built one for himself, and knows how

they should be built. That the mill, as built, was far less valuable, and of far less expense in construction, than one properly built of the size of fifty feet by one hundred and fifty feet. That said Medbery and Aldrich and their grantees and assigns, cut, took away.
319 and used from the premises purchased as aforesaid from said defendant, a very large amount of valuable pine and other timber, but principally pine, amounting to many millions of feet of lumber when manufactured. That deponent knows what the cost of the logs was at the mill, the cost of manufacturing the same into lumber, the price of lumber during the time he was at Watervliet, and the quantity of lumber manufactured, very nearly, and expenses of geting the lumber to market, and that from his knowledge and observation the profits derived from said property by said firm of Medbery and Aldrich, and their assigns, were very large during the time they had possession of the same.

That there was a large grist mill upon the property, which was in good order when said firm purchased it as aforesaid, and did a profitable business; that the same was burnt while in their possession; said mill was about forty feet by sixty feet in size; that subsequently the grantees of said firm, caused to be erected upon the same place another grist mill, just half the size of the former mill, which never did good work while they owned it; that the said basement, barn and long shed were burned while in the possession of said Medbery & Aldrich, or their assigns or grantees. That deponent was acquainted with the condition of said property in the month of April, eighteen hundred and sixty-three, when the same was sold under forclosure of mortgage, to said defendant, Burrill A. Olney and Galen M. Fisher; that the same was in a very dilapidated condition, that the largest portion of the most valuable timber had been stripped and wasted, the dam broken, the slide torn out, the booms gone, the head gates destroyed, two large breaks in the embankments of the race, the bulkhead to the double saw mill broken away, and the double saw mill undermined and badly settled, much of the machinery was injured, the belts gone and all the mills and other buildings upon the premises, and fences, and orchards were dilapidated, injured, decayed and damaged. That deponent was residing upon said premises from about the first of December, A. D. eighteen hundred and fifty-
320 four, to the first of August, eighteen hundred and fifty-six, that he was well acquainted with defendant, that defendant left Watervleit in the spring of the year eighteen hundred and fifty-five for the east, and that he was not again at Watervliet, to the knowledge of deponent, but once from that time until deponent left there in eighteen hundred and fifty six, at which time he remained a few weeks in the spring of eighteen hundred and fifty-six, which was after said new mill was erected and enclosed. Deponent knows that a platform was connected with said new mill, on the lower side, for the purpose of rafting lumber more conveniently. It was a kind of wharf for the convenience of shipping. It was no part of the structure of the mill, but merely an appendage to the mill for the

more convenient shipping of lumber; a wooden platform without cover or roof over it.

SEBASTIAN SMITH.

Subscribed and sworn to, befrore me, this 27th day of June, A. D. 1864

ADDISON MANDELL,
U. S. Com'r, Eastern Dis't of Michigan.

[5 cent revenue stamp, cancelled.]

321 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, Addison Mandell, a United States commissioner for the eastern district of Michigan, under and by virtue of the several acts of Congress, in such case made and provided, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness, Sebastian Smith named in said deposition, resides in the county of Berrien, in the State of Michigan, more than one hundred miles from the place where the court at which the court in which said deposition is taken is appointed by law to be held, which fact appears in and by the affidavit of Isaac N. Swain hereto attached, and to which reference is here made for the proof thereof, and of the fact set forth in the said affidavit.

I further certify, that on the twenty-seventh day of June, A. D. 1864, I was attended by Isaac N. Swain, the defendant in said cause, and by said Sebastian Smith, the said witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness at my office in the city of Detroit, in said district, and after the same was read over by me to said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and sixty-four.

[SEAL.]

ADDISON MANDELL,
United States Commissioner for the Eastern District of Michigan.

[5-cent revenue stamp, cancelled.]

322 UNITED STATES COURT.

In the circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac N. Swain having been by me duly sworn, says that he is the defendant in the above entitled cause, that he is informed and verily believes that the testimony of Warren M. Baldwin of Watervliet, Berrien county, Michigan, now in Detroit, in said State, is material and necessary for the defendant in the trial of said cause, that the said Warren M. Baldwin resides more than one hundred miles from the court, at which this deponent expects the said cause will be trieed, is appointed by law to be held. And this deponent further says that he is informed and believes that the attorneys and solicitors for the complainants, and said complainants, reside over one hundred miles from the city of Detroit, the place where the examination of the said witness is expected to be taken

ISAAC N. SWAIN.

Sworn to and subscribed, before me, on this twenty-eighth day of June, A. D. 1865.

ADDISON MANDELL,
U. S. Commissioner for the Eastern District of Michigan.

Let Warren M. Baldwin, the witness named in the foregoing affidavit of Isaac N. Swain be examined, de bene esse, before me accordingly, at my office, in the city of Detroit, on this twenty-eighth aay of June, A. D. 1865, at 10 o'clock a. m. No notice of taking *of taking* the same being required.

ADDISON MANDELL,
United States Commissioner for the Eastern District of Michigan.

323 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Be it remembered, that on this twenty-eighth day of June, in the year one thousand eight hundred and sixty-five, I, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st. 1817, and the act entitled "An act to establish the judicial courts of the

United States," passed September 24th, 1789. did cause personally to appear before me, at my office, in the city of Detroit, in the eastern district of Michigan aforesaid, Warren M. Baldwin, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States in and for the district of Wisconsin, at the city of Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

ADDISON MANDELL,
U. S. Commissioner.

And the said Warren M. Baldwin, being about the age of twenty-five years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said Warren M. Baldwin, and he did thereupon depose, say, and testify, as follows, to wit:

That he is of about the age of twenty-five years, and that his residence is at Watervleit, Berrien county and State of Michigan. That his occupation is that of manufacturing lumber and attending to the general business of his firm in that department; that he is a member of the firm of Swain, Olney & Company, merchants and lumber manufacturers at said Watervleit. I am acquainted with the defendant, but not with the complainants in this suit. I am well acquainted with the mill and other property at said Watervleit, formerly owned by John W. Medbery and James F. Aldrich, who constituted the firm of Medbery and Aldrich, formerly purchased by them of said defendant. I have been well acquainted with said property, consisting of mills, store buildings and lands, for over a year past, and
324 am one of the present owners of said property. I have been engaged in the management of said propery during my residence there for over a year past, and have had the general charge of the manufacture of lumber there, upon said property for my said firm. I am well acquainted with the saw mill built upon said property by said Medbury and Aldrich, and have had the charge of running and working said saw mill during said year. Said saw mill is sixty feet square, on its foundation. I have had occasion to measure it, and know such to be the fact; and the size of the basement of said saw mill is also sixty feet square. The size of the main or upper story is sixty feet by seventy-eight feet, eighteen feet thereof being extended across a waste water place, which is no part of said mill, on to another saw mill, now known as the old or double saw mill, and is partly supported by said old mill. The east side of said mill, bui
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tled out of level at least eight inches, setting more on the
corner of the sixty feet square, where the new saw mill i
across the waste water place to the said old mill. I don'
the basement of said new saw mill has ever been enclose
not a suitable place, in my opinion, for doing any kind of work in;
and said firm of Swain, Olney & Company, who now run the mill,
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322 UNITED STATES COURT.

In the circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and EDWARD P. WHALING,
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EASTERN DISTRICT OF MICHIGAN, *ss:*

Isaac N. Swain having been by me duly sworn, says that he is the defendant in the above entitled cause, that he is informed and verily believes that the testimony of Warren M. Baldwin of Watervliet, Berrien county, Michigan, now in Detroit, in said State, is material and necessary for the defendant in the trial of said cause, that the said Warren M. Baldwin resides more than one hundred miles from the court, at which this deponent expects the said cause will be trieed, is appointed by law to be held. And this deponent further says that he is informed and believes that the attorneys and solicitors for the complainants, and said complainants, reside over one hundred miles from the city of Detroit, the place where the examination of the said witness is expected to be taken

ISAAC N. SWAIN.

Sworn to and subscribed, before me, on this twenty-eighth day of June, A. D. 1865.

ADDISON MANDELL,
U. S. Commissioner for the Eastern District of Michigan.

Let Warren M. Baldwin, the witness named in the foregoing affidavit of Isaac N. Swain be examined, de bene esse, before me accordingly, at my office, in the city of Detroit, on this twenty-eighth aay of June. A. D. 1865, at 10 o'clock a. m. No notice of taking *of taking* the same being required.

ADDISON MANDELL,
United States Commissioner for the Eastern District of Michigan.

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Eastern District of Michigan, ss:

Be it remembered, that on this twenty-eighth day of June, in the year one thousand eight hundred and sixty-five, I, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the

United States," passed September 24th, 1789. did cause personally to appear before me, at my office, in the city of Detroit, in the eastern district of Michigan aforesaid, Warren M. Baldwin, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States in and for the district of Wisconsin, at the city of Milwaukee, in the State of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant.

ADDISON MANDELL,
U. S. Commissioner.

And the said Warren M. Baldwin, being about the age of twenty-five years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, I carefully examined the said Warren M. Baldwin, and he did thereupon depose, say, and testify, as follows, to wit:

That he is of about the age of twenty-five years, and that his residence is at Watervleit, Berrien county and State of Michigan. That his occupation is that of manufacturing lumber and attending to the general business of his firm in that department; that he is a member of the firm of Swain, Olney & Company, merchants and lumber manufacturers at said Watervleit. I am acquainted with the defendant, but not with the complainants in this suit. I am well acquainted with the mill and other property at said Watervleit, formerly owned by John W. Medbery and James F. Aldrich, who constituted the firm of Medbery and Aldrich, formerly purchased by them of said defendant. I have been well acquainted with said property, consisting of mills, store buildings and lands, for over a year past, and
324 am one of the present owners of said property. I have been engaged in the management of said propery during my residence there for over a year past, and have had the general charge of the manufacture of lumber there, upon said property for my said firm. I am well acquainted with the saw mill built upon said property by said Medbury and Aldrich, and have had the charge of running and working said saw mill during said year. Said saw mill is sixty feet square, on its foundation. I have had occasion to measure it, and know such to be the fact; and the size of the basement of said saw mill is also sixty feet square. The size of the main or upper story is sixty feet by seventy-eight feet, eighteen feet thereof being extended across a waste water place, which is no part of said mill, on to another saw mill, now known as the old or double saw mill, and is partly supported by said old mill. The east side of said mill, built by said Medbury and Aldrich, (which I shall call the new saw mill,) has settled out of level at least eight inches, ~~setting~~ more on the northeast corner of the sixty feet square, where the new saw mill is extended across the waste water place to the said old mill. I don't think that the basement of said new saw mill has ever been enclosed, and it is not a suitable place, in my opinion, for doing any kind of work in; and said firm of Swain, Olney & Company, who now run the mill, have never used the basement for any purpose, as the number of

Settling

small water wheels placed all along in the basement of said new mill cause so great a commotion of the water, causing it always to be damp, and wet, and very unhealthy; and in consequence of such dampness and unhealthiness, the lath works that were formerly used or intended to be used in said basement, being no longer used, the lath manufactured at said mills is made in the said old mill; all of said lath are manufactured in said old mill. There is not sufficient room in the basement of said new mill for the manufacture of said lath, so much of its space being occupied by water wheels, spouts, flumes, &c. I have examined said basement of the said new saw mill, and have never discovered any signs or indications that there has
325 ever been a room enclosed in said basement suitable or proper for the carrying on of any mechanical work. I am very familiar with the appearance and arrangement of said basement. Said new saw mill has been put in good repair, and the amount of lumber that can be sawed and fitted for market, in said new saw mill, will not average more than twenty-five thousand feet to the twenty-four hours; which seems to be the full capacity of said mill, owing in a large measure to the great inconvenience of handling the lumber in said mill, all of which has to be handled with great expense of both time and labor, having to be carried from one saw to another, and finally conveyed sideways through the mill to its extreme north end, to the track leading out of the mill; and lumber from the saws on the south side of said mill has to be carted across the mill to the said track on the north side, thereby interfering materially with the handling of the lumber from the other saws, having to cross past the carriage ways of the same; a large amount of which labor and expense might have been saved by such a construction of the mill as would have allowed the lumber to be conveyed forward from one saw to another, without either interfering with the other, and in the process of manufacture, the lumber would have been gradually carried nearer the car, which was to carry it to its proper place for rafting or piling, according to the season of the year of its manufacture. There was plenty of room in that locality to have built a mill fifty feet by one hundred and fifty feet in size, the length extending up and down the stream, and a saw mill of that size in that locality and properly built would have been much more economical of time and labor than the said new mill built by said Medbury & Aldrich, and such a mill, fifty feet by one hundred and fifty feet in size, properly built and arranged, and located there, would have admitted of more and far better railway facilities within its limits than said new mill. There is a platform built upon the west or down stream side of said new mill, which I have been informed and believe was built
326 by said Medbury and Aldrich, which has the appearance of having been built about the time when the mill was built, said platform consists of a common frame work with loose plank floors, the lower one filled in with any kind of timber for sleepers that would do to lay a loose plank floor on. Said platform has never been enclosed or covered with a roof, nor can said platform be used to any good advantage for storing, assorting or rafting lumber from, and, in fact, it

can be used only at a disadvantage, except so much thereof as is used for edging purposes, and said platform is no part of said new saw mill, neither is it a very necessary appendage to said mill. There is a structure or building upon said platform, outside of said new mill, built over the edging table, of the size of about eighteen by twenty-eight feet, built cheaply and of light balloon frame, and of a temporary nature and construction. There is, in my opinion, upon said premises far better and more convenient places for assorting and rafting lumber manufactured at said mill than said platform, and quite available, to any extent. In my opinion, the proper place for assorting lumber is in the mill, under cover, where the same is sawed, and there is not room enough in said new mill for that purpose. There is only about one-fourth of the year suitable for rafting lumber from said mill, on account of ice in winter; floods in spring and fall, and low water in summer. I know of all the repairs that have been made upon said property since the fifteenth day of April, A. D. eighteen hundred and sixty-three, and what has been the cost of the same, or very nearly so, said repairs have cost said firm of Swain, Olney & Co. about twenty-eight or twenty-nine thousand dollars. I know this from the books and accounts kept of the same previous to my going there, and since that time I know of my own knowledge. The present value of the entire Watervleit property, formerly owned by said Medbery & Aldrich, and purchased by them of said Swain, and now owned by said Swain, Olney & Co., is, in my estimation, from forty-five to fifty thousand dollars. I am acquainted with Russell Swain, the deaf and dumb brother of said defendant; have employed him, and seen him work, and consider him a good mechanic, and handy in the use of tools and machinery. The present owners of said pro-
.327 perty have put in good and proper headgates, and waste weir.
Have had high water and floods during the past year sufficient to, and which have carried off a mill dam upon Mill Creek, and all the dams above us upon the Paw Paw river, upon which streams said mills are located, and did not have any difficulty in controlling the water of said flood, and keeping it at any time from doing damage to any of the water works upon said property, and I do not consider or believe, from what I have seen and heard of said streams, and of the water powers of said property, that there is, or is likely to be any difficulty in controlling the water and preventing damage to said works, by reason of floods in the streams, if there are good and proper head or guard gates, and waste weirs kept in proper order upon said water works.

I would say as to the repairs above referred to, that all necessary repairs to said property have not been completed, that the large double saw mill, called the old mill, has not yet been repaired, and is in a nearly ruined condition, and about the same as it was when it came into the present proprietors possession, and, in my opinion, it cannot be repaired successfully, except by rebuilding the main and principal part of it, both building and machinery, which as is estimated by competent persons will cost near four thousand dollars, besides

many other repairs of less importance, which, in my opinion, should be made.

WARREN M. BALDWIN.

Subscribed and sworn to before me, this 28th day of June, A. D. 1865.

ADDISON MANDELL,
U. S. Com'r, East'n Dist. of Mich.

328 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, Addison Mandell, a United States commissioner for the eastern district of Michigan, duly appointed under and by virtue of the said several acts of Congress in such cases made and provided, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness, Warren M. Baldwin, resides at Watervliet, in the State of Michigan, as appears by the affidavit of Isaac N. Swain, the defendant in the within entiled cause, which is hereto annexed, who made oath that said witness resides more than one hundred miles from where the court at which the said cause is to be tried, is appointed by law to be held, and that the complainants in said cause, and their attorneys and solicitors, reside over one hundred miles from the city of Detroit, where said deposition was expected to be taken, and that the testimony of said witness is material and necessary for said defendant in the trial of said cause.

I further certify, that the said Isaac N. Swain requested me that the said Warren M. Baldwin might be examined according to the directions of the act of Congress in such cases made and provided. Whereupon, I ordered that the said Baldwin should be examined de bene esse before me, at my office in the city of Detroit, on the twenty-eighth day of June, A. D. eighteen hundred and sixty-five, at ten o'clock a. m., no notice of the taking of the same being required, as appears by said order attached to said affidavit, hereto annexed.

I further certify, that on the said twenty-eighth day of June, A. D. 1865, I was attended by said Isaac N. Swain, the defendant in said cause, at the time and place appointed as aforesaid for the taking of said deposition, and by the said witness, who was of sound mind and lawful age, and the said witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing, in the presence of the said witness and said Swain; and after carefully read over by me to the said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing it up, and directing it with my own hand to the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this twenty-

ninth day of June, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.]

ADDISON MANDELL,
United States Commissioner for the Eastern District of Michigan.

329 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to John Whitehead, esq., of New Ark, New Jersey, greeting:

[SEAL.] Know ye, That in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine Galen M. Fisher, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stevens, & Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part of the defendant, upon the interrogatories annexed to this commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Galen M. Fisher to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit court of the United States, before the judge thereof, with all convenient speed.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this twenty-third day of May, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

To the circuit court of the United States for the district of Wisconsin.

I, John Whitehead, to whom the within commission is directed, do hereby certify and return, that the execution of said commission will fully and at large appear by the schedule and deposition hereto annexed, to which I beg leave to refer.

Witness my hand at Newark, N. J., June fifteenth, A. D. 1865.

J. WHITEHEAD.

330 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify, that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct

transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 23d day of May, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

331 Circuit court of the United States, district of Wisconsin.

STEPHEN H. SEAMENS, CATHARINE M. STEPHENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN.

Interrogatories to be propounded, in the above-entitled cause, to Galen M. Fisher, esq., of Rahway, Union county, New Jersey, under and by virtue of a commission to be issued to John Whitehead, esq., of Essex county, New Jersey:

First. What is your name, age, and present occupation, and where do you now reside, and do you know the defendant, Isaac N. Swain?

Second. State whether or not you were engaged in business with said Swain in the spring and summer of 1856. If yea, in what business, and at what place?

Third. Did you see the defendant, Isaac N. Swain, in the spring and summer of the year 1856? If yea, when and where? Give the time and place with exactness and particularity.

Fourth. Do you know the lands and mill property situated at Watervliet, Michigan, formerly owned by Medbery & Aldrich? If yea, when did you first become acquainted with that property?

Fifth. Did you attend the sale of that property under the decree of foreclosure entered in the circuit court of Berrien county, Michigan, in the case of Isaac N. Swain *vs.* Medbery & Aldrich *et als?* If yea, state how and in what manner said sale was conducted. State what was the opportunity for bidding. State who was present at said sale. State who bid at said sale. State whether or not anything was said or done by any party to hinder bidding.

Sixth. Had there, to your knowledge, been an adjournment
332 of said sale at the request of any party? If yea, what party or parties? State whether or not, on the adjourned day of the sale, any of said parties who had asked for an adjournment were present at the sale and bid, and who of said parties. State the reasons asked for an adjournment, and state what the said defendant said and did about the said adjournment.

Seventh. Were you one of the parties who bought the said property? If yea, what share did you pay or agree to pay for said property?

Eighth. State whether or not you have examined the said property. If yea, when, and state what was the condition of the said property. State generally its condition.

Ninth. State whether or not you have been familiar with machinery, and with the use and operating of water powers.

Tenth. Do you know the saw mill on said property built by Medbery & Aldrich? If yea, state what was the size of said mill. Was the said saw mill as good and available a mill, as to shape, size, and capacity as could or might have been built upon said premises? State wherein and in what particulars said mill, as built, was defective, and state whether the platform there built by said Medbery and Aldrich was a necessary fixture, or any part of said mill.

Eleventh. State whether or not it was necessary to expend a large amount to repair said saw mill and water power in order to put the same in good working order. If yea, state whether such repairs have been made, and what has been the cost of such repairs and expenditures.

Twelfth. State whether or not the said saw mill upon said premises was as good or as valuable as a saw mill, properly built, fifty by one hundred and fifty feet, and state whether or not a saw mill could have been built upon said premises fifty by one hundred and fifty feet. State the advantages, if any, of such a saw-mill building over the one that was built.

333 Lastly. Can you state any other matter or thing which may be of benefit or advantage to the parties to this suit? If yea, state the same fully and at large in your answer to this interrogatory.

Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHERINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

And now come the said complainants, by N. C. Gridley, their solicitor, and object to the interrogatories addressed to Galen M. Fisher, numbered fifth, sixth, eleventh, for the reason that the same are incompetent, irrelevant, and immaterial. And the said complainant, not waiving their said exceptions, join in said commission, to be issued to John Whitehead, esq., of Newark, Essex county, New Jersey, to take the deposition of Galen M. Fisher, and propound to the said witness the following cross-interrogatories:

First cross-interrogatory. State whether or not you saw the defendant, Isaac N. Swain, daily during the spring and summer of the year 1856. How long an interval of time intervened at any one time, during the spring and summer of the year 1856, within which you did not see the defendant Swain? Can you state of your own knowledge that the defendant, Isaac N. Swain, was not, at any time, during the spring and summer of the year 1856, at and in the village of Watervliet, in the State of Michigan?

Second cross-interrogatory. Did you become acquainted with the saw mill built by Medbery & Aldrich at or about the time the same

was put in running order, and how soon thereafter? How often did you visit said saw mill prior to the damage thereof by a freshet?

Third cross-interrogatory. If, in answer to the 7th direct interrogatory, you shall state that you were one of the purchasers of the property therein referred to, state whether or not the terms
334 of payment for your interest therein was agreed upon between the defendant and yourself before the sale took place. Was the amount agreed upon at which the property was to be bid off, and at what amount?

Fourth cross-interrogatory. Was there, at any time before the day of sale of said property, any understanding between the defendant, yourself, and co-purchasers, that the defendant would sell to you one-third interest in said property at a fixed amount, and what amount, and the defendant to pass you the title papers therefor after the sale under the decree of court?

Fifth cross-interrogatory. State whether or not there was any understanding at any time between the defendant, yourself, and co-purchaser, that the defendant should be at liberty to bid in said property, at said sale, at an amount less than the amount fixed or agreed upon as the value of the property, before the sale thereof?

Sixth cross-interrogatory. Have you paid, or secured to be paid, or agreed to pay to the said defendant, or any person for the use or benefit of the said defendant, any greater sum or amount, for your interest purchased at sale, than one-third of the amount bid at said sale for said property; and if yea, what sum or amount?

Seventh cross-interrogatory. Did you make any examination of the saw mill and property of the said Medbery & Aldrich at or about the day of the sale thereof to yourself and co-purchasers? What was the immediate cause of the then condition of the said saw mill, or of its condition at the time you did see said saw mill, and before said sale?

Eighth cross-interrogatory. Are you a mechanic or wheelwright by trade, and how long have been such? Have you built or superintended the construction of saw mills, run by water power? If yea, how many, when, and where? Do you consider yourself an expert in the construction of saw mills run by water power?

335 Ninth cross-interrogatory. In your statement in answer to the 10th direct interrogatory, as to the size of the saw mill therein referred to, did you include the platform; and if not, why not? Was the platform connected to and with said saw mill, and how and why? What was the use of the platform? If the mill, as built, had not the platform connected thereto, where, in, or about said mill could the lumber, as sawed, been piled, assorted, and run out, and from what point shipped from said saw mill?

Tenth cross-interrogatory. How many gangs of saws were contained in the saw mill as built by Medbery & Aldrich, how many edgers, and how many machines for cutting lath and pickets? Was there also jack works for hauling logs into said mill, and how many? If a mill had been built 50 × 150 feet, up and down stream, could the same amount of machinery have been placed therein as was con-

tained in the mill as built by Medbury & Aldrich? If yea, when and how would you have placed such machinery? Could more than two gangs of saws have been placed in and worked to advantage in a mill 50 × 150 feet? If yea, how would have carried the water to the third gang without interfering with the other gangs? State with particularity. What amount of space in length and breath, in feet, is required to run each gang of saws?

Eleventh cross-interrogatory. Are you still interested in the saw mill and property formerly belonging to Medbery & Aldrich, at Watervliet, Michigan, and is the defendant a partner with you in the business connected with said saw mill and property? What, in your opinion, is the present value of such saw mill and property?

N. C. GRIDLEY,
Comp'l'ts Sol'r.

336 United States circuit court, district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling, comp'l'ts,
and
ISAAC N. SWAIN, def't.

To the circuit court of the United States for the district of Wisconsin:

I, John Whitehead, of Newark, New Jersey, to whom the annexed commission is directed, do hereby certify and return, that on this fifteenth day of June, one thousand eight hundred and sixty-five, I caused Galen M. Fisher, the witness named in the said commission, to appear before me at my office, No. 145 Market street, in the city of Newark, New Jersey; that I then and there publicly administered an oath to the said witness; that the answers to be given by him to the interrogatories proposed to him should be the truth, the whole truth, and nothing but the truth; that I then proceeded to examine said witness upon the several interrogatories annexed to said commission; that I reduced said examination to writing with my own hand, and caused the same to be subscribed by the said witness, and that I have duly certified the same. I do further certify that no exhibits were produced at the said examination, and that I have annexed said examination to the said commission.

Witness my hand this, fifteenth day of June, 1865, at Newark, N. J.

J. WHITEHEAD, *Comm'r.*

To the first interrogatory the witness saith, my name is Galen M. Fisher; I am thirty-nine years of age; I am now the cashier of the Union National Bank, Rahway, N. J.; I live at Rahway, and I know the defendant, Isaac N. Swain.

To the second interrogatory the witness saith, I was engaged in the mercantile business with J. N. Swain, at Palmer, in the
337 State of Massachusetts, in the name and style of Swain and Fisher, during the spring and summer of 1856.

To the third interrogatory the witness saith, I know from accounts

and records made at the time, as well as from clear and positive recollection, that I saw the said defendant, Isaac N. Swain, almost every day at Palmer, Massachusetts, and transacted business with him there from the 18th day of April to the 23d day of September, 1856, and that said defendant was not at any time out of the said Palmer for any ~~ten~~ days together during that whole period, that said Swain was constantly employed with workmen on his and my grounds there, and in the management of business at our store, which we owned and occupied together.

To the fourth interrogatory the witness says, I know very well the lands and mill property formerly owned by Medbury and Aldrich situate at Watervliet, Michigan, and became acquainted with them about the middle of April, 1863.

To the fifth interrogatory the witness says, I did attend that sale on the fifteenth day of April, 1863, at Berrien, in Berrien county, Michigan, and said sale was conducted in all respects in a legal and proper manner so far as I had any knowledge, with every opportunity for bidding. There were many present, and bid at said sale who were unknown to me. Among those known to me were the said defendant, Burrill A. Olney, Franklin Muzzy, besides two gentlemen from Milwaukee by the name of Haight and Whaling, besides others whose names I did not learn. Nothing was said or done by any party to prevent bidding.

To the sixth interrogatory the witness says, I knew of an adjournment of said sale from the first to the fifteenth of April, 1863, in accordance with a request of said Haight and Whaling, given for
338 the purpose of examining said property, as they stated they were interested in the sale, and for this purpose this adjournment had been consented to by said defendant. The said Haight, who had asked for the adjournment, was present at the sale and bid, and had every opportunity of bidding.

To the seventh interrogatory the witness says, I was one of the parties who bought said property at the highest bid that was made for the same, namely: $19,600, together with said defendant and Burrill A. Olney, share and share alike, one-third to each, and that I paid one-third of the said $19,600 for the same and no more.

To the eighth interrogatory the witness says, I examined said property most particularly immediately after said sale. It was then in a very bad and ruinous condition, both head and tail races were filled with dirt and floodwood, the dam was broken, the head and waste gates, and booms were gone; there were two very large breaks in the race, and the bulkheads were gone; the saw mills undermined and settled, and stripped of almost all their fixtures and much of their gearing; as was also the grist mill of fixtures, machinery, and bolting cloths; the timbers of the mill and other buildings and flumes were very much decayed, the fences mostly destroyed on the premises, the orchards opened as commons, and most of the valuable timber cut and removed from the premises; most of the lands had been sold for taxes, some of which we were able to redeem, and some we could not.

To the ninth interrogatory the witness says, I have had much experience in the running of mills and machinery, and in the use and operating of water power.

To the tenth interrogatory the witness says, I am acquainted with the said mill built by Medbury and Aldrich on the said premises, the size of said saw mill on its own foundation was sixty feet square, with an extension of the upper part over on to another mill. In my
339 opinion said saw mill was not as good and available a mill as might and ought to have been built in that position. It was defective both in size and convenience of handling and managing logs and lumber, and in the bulkheads which were unsafe and imperfect. The platform to said mill was not a necessary fixture, and no part of said mill, and of but very little use whatever; there is abundance of better room than it affords for sorting, storing and shipping lumber. The lumber has to be piled in the mill yard until the spring and fall freshet admit of rafting it, which is only about one-quarter of the year, while the platform would not hold over one day's full product of the mill.

To the eleventh interrogatory the witness says, I was at Watervleit for more than a year after the purchase of the said property, and had charge of the books and accounts, and was familiar with the expenditures that were made; they were not completed when I left there in June, 1864; much has since been done. From my own knowledge and the best information I have received, I believe repairs and expenditures have cost the company over or about the sum of $28,000 (twenty-eight thousand dollars.) It was necessary to expend a large amount to repair said mills and property, and this sum of twenty-eight thousand dollars was expended only for necessary repairs and expenditures to said mill and water power.

To the twelfth interrogatory the witness says, I do not estimate the said saw mill as built, to be half the capacity or value of a mill fifty by one hundred and fifty feet. Such a mill, properly built, enclosed and lighted, with ~~heart~~ breast wheels properly geared, and railway tracks as such a mill would admit of, for the handling and assorting of logs within the same by day and night would have easily turned out one hundred thousand feet of boards per day of twenty-four hours. Whereas the mill they did build has never, to my knowledge, been capable of sawing over twenty-five thousand feet of boards in the same time. Such a mill fifty by one hundred and fifty feet
340 could have been built there, or even much larger if desired, and a mill fifty by one hundred and fifty feet would have avoided the present laborious and unhandy way that has to be employed in moving logs, bolts, and cants sideways from carriage to carriage, as is now necessary to be done, in order to run the mill at all, instead of continuous railway tracks as on a mill fifty by one hundred and fifty feet properly constructed.

To the last interrogatory the witness says, Nothing more occurs to me which to say ~~what~~ would be of advantage to the parties in this suit.

GALEN M. FISHER.

Sworn and subscribed before me at Newark, N. J., June 15, 1865.

J. WHITEHEAD, *Com.*

To the first cross-interrogatory the witness saith, I did see said Swain almost daily, not over ~~ten~~ two days intervened at any one time during the time specified, when I did not see him. I can state, from my own knowledge, that said Swain, during the said specified time, did not visit Watervliet, Michigan, for the obvious reason that he could not have done so in my not ever, to exceed ~~ten~~ two days' absence from said Palmer Mass.

To the second cross-interrogatory the witness saith, I never saw said saw mill at Watervliet, built by Medbery and Aldrich, or visited the same until on or about the middle of April, 1863, which was after it was sold at public auction.

To the third cross-interrogatory, the witness saith, The terms agreed upon before the sale were cash, at just my share, namely: one-third of whatever it was bid off at, more or less, but not to exceed $20,000. At any sum below that we, three, were to buy it together on equal footing as to price; if it went above that, it was understood that none of us would buy it.

341 To the fourth cross-interrogatory, the witness saith, The defendant did not, before the day of sale or at any other time whatever, agree or propose to sell to me, and co-purchaser any interest whatever, or at any price whatever. If bought at all at said sale it was to be for all and equally alike, at any sum less than $20,000; that sum being the extent we were willing to pay for it in the condition it was then in.

To the fifth cross-interrogatory, the witness saith, There was no such understanding, and no amount was fixed or agreed upon except as fully specified in answer to fourth cross-interrogatory.

To the sixth cross-interrogatory, the witness saith, No greater sum than $19,600 paid for the said property, and my one-third thereof, have I ever paid or agreed to pay to said defendant, or for his use or benefit.

To the seventh cross-interrogatory, the witness saith, I did not examine said mill and property until after the said sale, and found it then in very bad and ruinous condition, the cause of which I am ignorant of.

To the eighth cross-interrogatory, the witness says, I was an iron founder of mill castings by trade, and foreman of two different foundries during more than two years; have for five years, in addition, both run and built a factory using water power, but not any saw mills, except at Watervliet. I consider myself capable of the building, or running an ordinary water saw mill.

To the ninth cross-interrogatory, the witness says, I did not include the platform in giving the dimensions of said mill, because it is not available for the erection and running machinery, or an indispensible and important part of said saw mill; the said platform adjoins the said mill, but I do not know how it is attached, if at all, or why.

342 About one quarter of the platform was used by us to edge boards and assort them on; the other space was useless, with the mill so inconveniently built; doubtless this part of said platform which we used, about ¼ of the platform or increase of size of

mill was indispensable, from which to edge and assort the edged boards, but the only proper place to pile and ship lumber was on the margin of the tail race and river bank.

To the tenth cross-interrogatory, the witness says, In April, 1863, there were only two gangs incomplete in said saw mills, one sash saw, one edger on platform, and one jack works for hauling up logs; there was no other machinery there useable; all the above machinery from the water wheels up were almost made anew before it was possible for us to use them. A mill fifty by one hundred and fifty feet would have contained far more machinery, having a track laid through the center, and running the lower saws *saws* by ordinary belts, shafts, and pullies, with a ~~heart~~ wheel; the motion is usually obtained from a large drum on a stout shaft with iron gear, that is driven by segments on the periphery of the water wheel proper, fifty feet in length and twenty feet in breadth would be ample for each set of saws or for circular saws, which could have been erected therein.

To the eleventh cross-interrogatory, the witness says, I am interested in the saw mill and property formerly belonging to Medbery and Aldrich, and the defendant is my partner with others; $45,000 is my estimation the present value of the property.

GALEN M. FISHER.

Sworn and subscribed before me at Newark, N. J., June 15, 1865.

J. WHITEHEAD, *Com.*

343 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

[SEAL.] The President of the United States of America, to Nathaniel McDonald, esq., St. Louis, Missouri, greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority, to examine Clinton B. Fish, on his corporal oath, as a witness in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling, are complainants, and Isaac N. Swain is defendant, on the part of the defendant, upon the interrogatories annexed to this commission, and therefore you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Clinton B. Fish to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination and reduce the same into writing, and return the same annexed to this writ, closed up under your seal into the said circuit court of the United States before the judge thereof, with all convenient speed.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this twenth-eighth day of April, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

344 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 28th day of April, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

345 Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN. } In equity.

Interrogatories to be propounded to Clinton B. Fisk, now being in St. Louis, Missouri, under and by virtue of a commission to be issued to Nathaniel McDonald, of said city of St. Louis, in the State of Missouri:

First. What is your name, age, and present occupation, and where is now your present residence; and do you know the defendant, Isaac N. Swain; and how long have you known him?

Second. State whether or not you are any relative of the said Swain, and what is your relationship.

Third. State whether you saw the said Isaac N. Swain in the Spring of the year 1856. If yea, when and where? And if you have in your possession, or under your control, any writings, documents, letters, or telegraph dispatches which you can produce for the purpose of showing the exact time, in the spring of the year, 1856, that you saw the said Swain, please produce the same, and annex the same to your deposition in any answer to this interrogatory, and state the circumstances under which you sent and received said letters or telegraph dispatches.

Fourth. State whether or not you corresponded with said Swain during the spring or the summer of 1856. If yea, for what period of time during said spring and summer? From what point or points did you write; and to what point or points did you, during that
346 time direct your correspondence to the said Swain? Did you, during the same period, receive letters from the said Swain, and from what points or places did said Swain write you?

Lastly. Can you state or set forth any other matter or thing which may be a benefit or advantage to either of the parties to this suit?

If yea, set forth the same fully and at large in your answer to this interogatory.

FINCHES, LYNDE, & MILLER,
Solicitor for Def't.

Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. STEVENS, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

And now come the said complainants, by N. C. Gridley, their solicitor, and object to the interrogatories addressed to Clinton B. Fisk, numbered third and fourth, for the reason that the same is incompetent, irrelevant and immaterial; and the said complainants not waiving their said exceptions, join in the commission to be issued to Nathaniel McDonald, of St. Louis, State of Missouri, to take the deposition of the witness, Clinton B. Fisk, and propounded to the said witness the following cross-interrogatories.

First cross-interrogatory. State whether or not you were in daily communication with the defendant, Isaac N. Swain, during the spring and summer of the year 1856; and if yea, from what points or places?

Second cross-interrogatory. How long an interval of time occurred, at any one time, during the spring and summer of the year 1856,
347 in which you did not receive communications from the defendant? How often did you see the defendant in the spring and summer of the year 1856, and when and where?

Third cross-interrogatory. Can you state, of your own knowledge, that the said defendant, Isaac N. Swain, was not at any time during the spring and summer of the year, 1856, at and in the village of Watervleit, in the State of Michigan?

N. C. CRIDLEY,
Compl't's Sol'r.

UNITED STATES OF AMERICA, *Missouri District, sct*:

The deposition of Clinton B. Fisk, taken before me, Nathaniel McDonald, a commissioner duly appointed by the hon. the circuit court of the United States for the district of Wisconsin, on this 1st day of May, A. D. 1865, to be read in evidence in a certain cause now pending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamens, Catharine M. Stevens, and Edward P. Whaling are plaintiffs, and Isaac N. Swain is defendant—on the part of defendant.

The said deponent being first duly sworn by me, to testify the truth, the whole truth, and nothing but the truth, in reply to the following interrogatories, doth depose and say, as follows:

1st interrogatory. What is your name, age, and present occupa-

tion, and where is now your present residence? and do you know the defendant, Isaac N. Swain, and how long have you known him?

Answer to 1st interrogatory. My name is Clinton B. Fisk; my age is 36 years; my present occupation is that of a general officer of the United States volunteers; my present residence is St. Louis, Missouri; I know the defendant, Isaac N. Swain, and have known him 23 years.

348 Second interrogatory. State whether or not you are any relative of the said Swain, and what is your relationship.

Ans. I am a relative of the said Swain; his first wife, Mrs. Vallania Smith Swain, was the daughter of William Smith, who became the second husband of my own mother, bringing Mrs. Swain and myself into the relationship of step brother and step sister.

Third interrogatory. State whether you saw the said Isaac N. Swain in the spring of the year 1856; if yea, when and where? and if you have, in your possession, or under your control, any writings, documents, letters, or telegraph dispatches which you can produce for the purpose of showing the exact time in the spring of the year 1856, that you saw said Swain, please produce the same, and annex the same to your deposition in answer to this interrogatory; and state the circumstances under which you sent and received said letter or telegraph dispatches.

Answer to 3d interrogatory. I saw Isaac N. Swain, at Palmer, Massachusetts, on the 19th day of April, 1856, and for several consecutive days thereafter; I was in Hartford, Connecticut, on the 19th day of April, 1856, and wishing to visit my brother and sister, Mr. and Mrs. Isaac N. Swain, who were then residing at Palmer, Mass., and not knowing whether the said Swain had returned to his house from Michigan, whither I knew he had been, I telegraphed my sister from Hartford, in the following words:

"HARTFORD, *April* 19, 1856.

"Mrs. Isaac N. Swain, Palmer, Mass.: Are you all at home? Answer me, and I will be there on express train.

"CLINTON B. FISKE."

My sister, Mrs. Swain, answered me immediately, as follows:

"PALMER, *April* 19, 1856.

"Clinton B. Fiske, husband is here, and we shall be glad to see you.

"V. S. SWAIN."

The papers, marked A and B, hereto affixed, are the ori-
349 ginal telegrams that passed between myself and sister Vellenia at that date. I proceeded from Hartford to Palmer, on the railway express train of April 19, 1856, and on that date, was there met by Mr. and Mrs. Swain at the Palmer depot, and remained with them at their hotel, the House, as a visitor, until the the 22d day of the same month, when I departed for New York city

and Coldwater, Michigan, the latter place being my place of residence at that time. Mr. Isaac N. Swain left Palmer, Mass., on the morning of the 22d of April. 1856, for Worcester, Mass., with the avowed purpose of procuring fruit and ornamental trees for his grounds at Palmer, where he, said Swain, with his business partner at Palmer, a Mr. Fisher, were improving several acres of grounds, they, at that time, intended for their future home.

Fourth interrogatory. State whether or not you corresponded with said Swain during the spring or summer of 1856. If yea, for what period of time during said spring and summer; from what point or points did you write, and to what point or points did you, during that time, direct your correspondence to the said Swain? Did you, during the same period, receive letters from the said Swain, and from what points or places did said Swain write you?

Answer. I received letters from Mr. and Mrs. Swain during the entire year 1856, and had for very many years previously, and addressed communications to them. My letters were written from Coldwater Michigan, and from New York city, the former being my place of business; and as I was at that time a banker and merchant, was frequently in New York on business, and addressed from that point; my letters to them during the entire spring and summer of 1856, were all addressed to them at Palmer, Massachusetts, and my letters from them were all written from Palmer, Massachusetts.

Last interrogatory. Can you state or set forth any other mat-
350 ter or thing which may be of benefit or advantage to either of the parties to this suit? If yea, set forth the same fully and at large in your answer to this interrogatory.

Answer. My sister, in writing me under date of Palmer, June 28, 1856, among other family items writes as follows: "Swain and Fisher have put out over a thousand trees on the grounds upon Michigan avenue; and the fruit trees especially are looking fine; the evergreen not quite so well. They have done nothing more as yet towards getting the water over. I. N. has exposed himself too much to the intense heat for a few days past, and has been nearly sick; though better again. I. N. joins with me in this letter in haste."

1st cross-interrogatory. State whether or not you were in daily communication with the defendant, Isaac N. Swain, during the spring and summer of 1856; and if yea, from what points or places?

Answer. I was not in daily communication with him.

Second cross-interrogatory. How long an interval of time occurred at any one time during the spring and summer of the year 1856, in which you did not receive communications from the defendant? How often did you see the defendant in the spring and summer of 1856, and when and where?

Answer. I cannot tell precisely the length of intervals between the receipt of letters; the intervals might have been of one, two, three, or four weeks. I saw the defendant but once during the spring and summer of 1856, and this was at the time and place stated in my direct examination.

3d cross-interrogatory. Can you state, of your own knowledge,

that the said defendant, Isaac N. Swain, was not at any time,
351 during the spring and summer of 1856, at and in the village of Watervliet, in the State of Michigan?

Answer. I cannot.

CLINTON B. FISK.

I, Nathaniel McDonald, a commissioner duly appointed by the circuit court of the United States for the district of Wisconsin, and acting as such, do hereby certify that at the request of one Isaac N. Swain, I caused the above-named deponent, Clinton B. Fisk, to come before me at the time in the caption hereof stated, at my office in the city of St. Louis, Missouri; that the said deponent was then and there by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in reply to the interrogatories hereinbefore set forth; that the said deposition was wholly reduced to writing by me, and that the said deponent then and there in my presence subscribed the same; that I am not counsel or attorney for either of the parties, or interested in the event of said suit. All of which is certified to said court as true.

In witness whereof, I hereunto set my hand and affix my private seal, at St. Louis, Mo., this 1st day of May, 1865.

[SEAL.] NATHANIEL McDONALD,
Commissioner, &c.

[5-cent revenue stamp, canceled.]

352 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Addison Mandell, esq., greeting:

[SEAL.] Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine Isaac N. Swain and Philo Parsons, on their corporal oaths, as witnesses in a cause depending in the circuit court of the United States for the district of Wisconsin, wherein Stephen H. Seamans, Catharine M. Stephens, and Edward P. Whaling are complainants, and Isaac N. Swain is defendant, on the part of the defendant, upon the interrogatories annexed to this commission, and, therefore, you are hereby commanded that you, at certain days and places to be appointed by you for that purpose, do cause the said Isaac N. Swain and Philo Parsons to come before you, and then and there examine them on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seal, into the said circuit court of the United States, before the judge thereof, with all convenient speed.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of Milwaukee, in said district, this third day of June, in the year of our

Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

The execution of the within commission appears in certain schedules hereunto annexed.

Detroit, Aug. 1, 1845.

ADDISON MANDELL,
Commissioner.

353 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in the said district of Wisconsin, this third day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

354 Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHERINE M. STEVENS, and EDWARD P. WHALING,
vs.
ISAAC N. SWAIN.

Interrogatories to be propounded to Philo Parsons, of Detroit, Michigan, under and by virtue of the annexed commission, by Addison Mandell, and such other commissioner as may be named by complainants;

First interrogatory. What is your age name, age, and occupation, and where do you reside; and do you know the defendant, and how long have you known him?

Second interrogatory. State whether or not you saw the said defendant in the spring of 1856; if yea, state when and where you saw him, and where he was going. Give the day of the month, and the month.

Third interrogatory. Please state how you know the month, or the day of the month. If you shall state that it was on account of business transactions that you had with said defendant at the time, state whether you signed any writings at the time. If yea, produce said writings, and annex them to your deposition.

Lastly. Do you know, or can you state or set forth, any other matter or thing which may be of benefit or advantage to the parties to

this suit? If yea, state the same fully and at large in your answer to this interrogatory.

FINCHES, LYNDE & MILLER,
Sol'rs for Defendant.

355 Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMENS, CATHARINE M. SWAIN, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

Interrogatories to be propounded to Isaac N. Swain, the above-named defendant, by Addison Mandell, commissioner named on the part of said defendant, and such other commissioner as may be named by the complainants:

First interrogatory. Are you the defendant in the above-entitled cause; and where do you reside, and do you know John W. Medbury and James F. Aldrich?

Second interrogatory. Did you, on or about the 28th day of September, A. D. 1854, enter into a written contract with said John W. Medbury and James F. Aldrich, in and by which you agreed to sell to them a large quantity of real estate in the counties of Van Buren and Berrien, in the State of Michigan? If yea, have you said written agreement in your possession; and if you have, please annex the same to your deposition, and make it part of your answer to this interrogatory.

Third interrogatory. Did you, after the making of the said contract, have an additional contract drawn and endorsed upon the original contract, and is the same included in the said agreement annexed in answer to the preceding interrogatory?

Fourth interrogatory. Was there standing upon the said premises described in said contract, a shop building, which was at the time of the making of the said contract used and occupied by your deaf and dumb brother, Russell Swain? If yea, what was the
356 size of said shop building? State generally the character and shape of the said building, and state whether the same was at that time actually used and occupied by said deaf and dumb brother; and state what kind of machinery, and how much machinery, there was in said building; and state how and in what manner said machinery was operated, and how and in what manner the water for operating said shop was carried to said shop.

Fifth interrogatory. State whether or not your said deaf and dumb brother was a mechanic, and state what his general habits of industry were, and whether or not he was skilful in the use of tools and the machinery in said shop.

Sixth interrogatory. State whether or not prior to, and before the execution of said contract you had planned or contemplated building another saw mill upon the said property? If yea, state what was to have been the size and shape of the said new saw mill, and the kind

of machinery to be used in said saw mill, and the capacity of said saw mill.

Seventh interrogatory. Was there at the time this contract was made, a saw mill upon said premises? and state whether or not there was room or space between said saw mill and the said shop occupied by your said deaf and dumb brother to have constructed said new saw mill of the dimensions contemplated and not have interfered with the said shop of the said brother.

Eighth interrogatory. State whether or not the shape, size and plan of said new saw mill, and the kind of machinery to be used therein was talked over and discussed between you and the said Medbery and Aldrich.

Ninth interrogatory. If you shall answer the preceding interrogatory by showing that you did have such conversation with said
357 Medbery and Aldrich, state what the said Medbery and Aldrich said as to constructing and building a saw mill of that shape and size, and in accordance with said plan so talked over and discussed, and state whether or not the entire plan of said saw mill was talked over and agreed upon. State in answer to this interrogatory what was talked over and agreed upon as to the shape, size, and location of the said new saw mill, and the kind of wheels to be used, and the machinery to be used, and the whole scope, object, purpose and design of said saw mill.

Tenth interrogatory. State whether or not, you ever at any time, and when, went over the spot where said saw mill was to be located and measured the same with said Medbery, and pointed out the locality of the said saw mill.

Eleventh interrogatory. How, and in what way did it happen that the said agreement, as to the shape and size of the said saw mill and the machinery to be used in it was not included in the said written agreement, or reduced to writing? And state whether you called the attention of the said John W. Medbery to the said omission, and what he the said John W. Medbery said upon the subject.

Twelfth interrogatory. State whether or not the said Medbery did assent to and agree to the plan of the said saw mill talked over by and between you and him, and state whether or not the said Medbery gave you any, and if any, what authority to contract for the driving of the piles for the foundation of said new saw mill. State whether or not you did make such contract, and with whom, and for whom, and for what size saw mill.

Thirteenth int. State whether or not the said party so employed commenced, and in what year, to drive the said piles for said foundation, and how long he continued that year to drive said piles; and for what sized saw mill were the said piles driven.

358 Fourteenth int. State whether or not the location selected by you for said saw mill, and upon which location said piles were driven was or was not large enough and well adapted for a saw mill fifty by one hundred and fifty feet in size, of the capacity and shape, and with the machinery as was planned and agreed to be built. State how, and in what manner a saw mill of said size and shape built upon

the foundations commenced by driving said piles would have left or effected the shop of your deaf and dumb brother, and the water privileges of the said shop.

Fifteenth int. How long after the making of the said written contract with John W. Medbery and James F. Aldrich did you remain at Watervliet, and what, after the making of the said contract, was your principal purpose and object in remaining there? State whether or not during any portion of the time you remained at Watervliet, you saw the said John W. Medbery at that place, and whether you had any conversations with the said Medbery, or the said Medbery with you about said saw mill or the said shop of your said brother; and state whether or not said John W. Medbery ever made any and what complaints about the said shop at that time.

Sixteenth int. If you answer the last interrogatory by saying that you left Watervliet in the spring of 1855. State what time in the spring of 1855, where did you go, and how lond did you remain away from Watervliet. What were you doing during the greater portion of the time you were absent from Watervliet? When did you first return to the State of Michigan?

Seventeenth int. Prior to your leaving Watervliet, in the year 1855, had work commenced upon the foundations of the said new saw mill? If yea, how much work had been done?

Eighteenth int. After your leaving Watervliet in the spring of the year 1855, when did you first return again to the State of
359 Michigan and visit Watervliet, and for what purpose, and how long did you remain at Watervliet, in the State, or elsewhere on this visit? In what year, month, and day of the month, did you finally leave Watervliet, and the State of Michigan, on this visit? And where did you then go, where did you remain, and what was your principal business and personal occupation for several months afterwards? On this visit to Watervliet, did you see said saw mill built, or then being built by the said Medbery and Aldrich, and did you then see said shop, which you reserved for your deaf and dumb brother? If yea, state in what condition was said saw mill, and how near completed? What was the condition of said shop and its privilege of water power? Did you at any time on this visit see the said Medbery and Aldrich, or either of them? If yea, when, where, and how came you to see them? Did you then have any conversation with them, or either of them, about said shop and said saw mill? If yea, what was that conversation?

Nineteenth int. Since the destruction of said shop, how and in what manner has your deaf and dumb brother been employed, and who supports him?

Twentieth int. After you left Watervliet, in the year 1856, when and how soon after did you again see John W. Medbery or James F. Aldrich, or either of them, and which of them, and where? State where you came from and for what purpose you came to see said Medbery and Aldrich.

Twenty-first int. State whether or not James F. Aldrich ever at any time, and when, delivered any policy of insurance upon said new

saw mill, or upon any other buildings at Watervliet to you at Chicago, or any where else?

Twenty-second int. Did you ever, and when, receive from Medbery and Aldrich, or either of them, at any time, a policy or policies of insurance upon said new saw mill, to the amount of six thousand dollars, or any other amount?

360 Twenty-third int. State whether or not the said Medbery and Aldrich, or either of them, ever delivered any policy or policies of insurance to you upon said new saw mill, separate and distinct from the general policy or policies of insurance obtained upon the entire insurable property sold them.

Twenty-fourth int. Did said Medbery at any time, and when, ever forward or deliver to you any policies of insurance?

Twenty-fifth int. If you shall answer the last interrogatory by saying that you did receive any policies of insurance, annex all the policies of insurance that you did receive.

Twenty-sixth int. After the delivery of the said policies of insurance, state when if ever, you again received any policies of insurance from Medbery and Aldrich, or either of them.

Twenty-seventh int. If you shall answer the last preceeding interrogatory, by saying, that from the time you received said policies of insurance, you never received any policy or policies of insurance from said Medbery and Aldrich, or either of them, please state whether there was any, and how long a period of time that you had no insurance upon said premises, and state if you yourself procured policies of insurance upon said premises.

Twenty-eighth int. How came you to apply for policies of insurance upon said premises? Had you, prior to this time, demanded policies of insurance from said Medbery and Aldrich? Had you ever and if ever when, requested the privilege from either Medbery or Alrich of obtaining said policies of insurance? If nay, by what authority did you make the application, and obtain the policies? To whom did you apply for policies of insurance; when, where and from whom did you first learn that there was any existing insurance upon said property? State all the information you had upon this point, and the source of the information. State how you came to name the amount of the policy or policies issued upon the property in your application for insurance. Who paid in the first instance the

361 premiums for said policies of insurance? What amount, if any, did Medbery and Aldrich pay? If you say you paid the amount of the said premiums in the first instance, who repaid you, and when?

Twenty-ninth int. At the time you made the application for policies of insurance, did you hold any insurance upon said property, and if any, what amount, and in what insurance companies? What amount of insurance had you at any one time upon the said premises during the time they were owned by Medbery and Aldrich? What was the value of the insurable property on said premises at the time you made the application for insurance? Had you at any time insurance upon said property to an amount equal to one-third of the value of

the insurable property upon the premises sold by you to Medbery and Aldrich.

Thirtieth int. What is the size of the saw mill that was built by the said Medbery and Aldrich at Watervliet? Was said saw mill, as built, ever accepted by you as a compliance with the said contract of Medbery and Aldrich? Were you, in the spring of the year 1856, present with John W. Medbery, J. S. Stewart, and Henry F. Miller, at said saw mill in Watervliet? State whether you at any time in the spring or summer of 1856, or at any other time after the completion of said saw mill, went through said saw mill with said named parties, and was shown the same, and the change in the original plan; and were the reasons of the said change explained to you. State whether or not you were asked if you were satisfied with said change; and whether or not you declared yourself to be satisfied, and accepted the same as a compliance with said contract of said Medbery and Aldrich, or the provisions expressed in the agreement endorsed upon the mortgage in suit.

Thirty-first int. In the deposition of Jonathan S. Stewart, taken in this cause, in answer *in answer* to the nineteenth direct inter-
362 rogatory, he says, as follows: "That in the forepart of May, 1856, but on what particular day of the month he does not now recollect, he (meaning said J. S. Stewart,) together with the above named John W. Medbery, the defendant, Isaac N. Swain, and Henry A. Miller, the machinist who put the machinery into the saw mill for Medbery and Aldrich, were present at the said saw mill, and that they each and all of them went in and around and through every part of said saw mill, and inspected and examined the timbers, machinery, gearing, platform, and every part of the building, which was then very nearly and almost entirely completed, a portion of it having been previously completed and put in running order, and as the inspection of it was so being made by the said parties, the attention of the said Swain was called by the said Medbery to the change of the size of the mill, from 50 feet by 150 feet, to that of 78 feet by 100 feet, and the reasons assigned by Medbery why it was made, and the necessity for such change, and the said Miller also explained and pointed out to said Swain while the inspection of the gearing and machinery was thus being made, the benefits that would result from, and the necessity of the change, and after the inspection and examination had been gone through with, and the explanations given, and the reasons assigned for the changes thus made in the erection of the mill, the said Swain was asked by the said Medbery if he was satisfied with the change that had been made, and that said Swain replied that he was, &c., &c." Please state whether you were present as therein alleged with said parties, and state all that you know about said alleged facts.

Thirty-second int. Have you ever been engaged in the business of planning and estimating the cost of buildings, using and operating saw mills, and other kinds of mills, and for how long a time? Have you made that kind of business a speciality; and how much experience have you had in said departments of business? Have you

also been engaged in the business of engineering, laying out, leveling, and estimating water powers?

363 Thirty-third int. When did you first see and examine said saw mill, after it was completed, as built by Medbury & Aldrich, so as to know, in all its details, the said saw mill? What is your opinion, in reference to the said saw mill built by Medbury & Aldrich, as to its being a first class mill, as to its capacity, as to its being properly constructed, and as to the character of its machinery?

Thirty-fourth int. Was the said saw mill, built by Medbury & Aldrich, as valuable as a saw mill 50 by 150 feet in size, properly built, according to the plan agreed upon between Medbury & Aldrich, and yourself? Give your reasons in full for your opinion.

Thirty-fifth int. State, whether or not, in your opinion, it was practicable to have built upon the stream, on which said mill is situated, a saw mill, 50 by 150 feet, upon the foundations commenced by driving piles in the fall of 1854. State, whether or not, a saw mill of that size, properly built as planned, and as agreed to be built by Medbury and Aldrich upon said foundations, would have been of any more, and how much more value, than the saw mill that was built; and state whether said saw mill, of 50 by 150 feet in size, and properly built, according to the plan agreed upon, was better adapted for the purpose intended than the one that was built. If yea, state why and wherein, and give your reasons therefor fully and particularly.

Thirty-sixth int. State whether or not, in your opinion, the said saw mill, built by the said Medbury & Aldrich, was well and properly built and completed in a workmanlike manner. If nay, state wherein, and in what respect.

Thirty-seventh int. State what, in your opinion, would have been the advantages, if any, of a saw mill, 50 feet by 150 feet in size, and properly built on said foundations, as planned and as agreed

364 to be built by them. If any, state the reasons in detail.

Thirty-eighth int. State what, in your opinion, if any, would have been the capacity for manufacturing lumber of the mill built on the premises at Watervleit, upon the foundation commenced by driving piles in the fall of 1854, of the size and plan agreed to be built by Medbury & Aldrich, over that of the mill that was built by them.

Thirty-ninth int. State the comparative value, in your opinion, as well as the cost of building the saw mill built by Medbury & Aldrich, and a saw mill such as Medbury & Aldrich agreed to build upon the said premises of 50 feet by 150 feet in size.

Fortieth int. State, whether or not, the platform is any part of the saw mill building. If nay, state why not. Is said platform a necessary appendage to said saw mill? What necessity, if any, would there have been for said platform if Medbury and Aldrich had built as planned, and as they agreed to build, a saw mill 50 feet by 150 feet in size, upon the foundation commenced by driving piles in the fall of 1854?

Forty-first int. State, whether or not, in your opinion, a saw mill,

of the dimensions of 50 feet by 150 feet in size, built upon the same premises and stream of water as the mill that was built by Medbury & Aldrich, would have admitted of the construction of any better railway facilities for passing logs and lumber through the length of the mill, from one carriage to another, and thence, when manufactured into lumber, out of the mill into the lumber yard for market, than the mill as erected by Medbury and Aldrich; and why? State fully.

Forty-second int. What was the nature of the soil on and in which the foundation of the bulkhead, or front piling of the saw mill,
365 built by Medbury & Aldrich, rested? State, whether or not, you had occasion to examine and test the character of the soil. State what examination you made of said soil, and the reasons that induced you to make such examination.

Forty-third int. What would have been the nature of the soil for the foundations of the bulkhead and front piling had said saw mill been erected 50 feet by 150 feet in size, upon the foundation commenced by driving piles in the fall of 1854?

Forty-fourth int. State, whether or not, you went from Detroit to attend the sale of the Watervleit property, which was advertised, under the decree of foreclosure, to take place on the first day of April, A. D. 1863. If yea, state to what place you went for that purpose. State whether you met any parties at that place from Milwaukee; and who, and whether said sale took place at that time. If nay, why not, and at whose request said sale was postponed, for how long a time, and for what purpose?

Forty-fifth int. Were you present at the adjourned day of said sale? Who was present? What number of bidders were there present? Who bid, and what amount was bid, and by whom? How was the sale conducted?

Forty-sixth int. What was the condition of the said property at the time of the said sale? State its condition as minutely, and with as much detail as you can.

Forty-seventh int. State whether any, and if any, what repairs have had to be made to put the water power, mills, other buildings and improvements, in a fit condition for use, and what has been the cost of said improvements.

Forty-eighth int. State, whether or not, you saw John W. Medbury at any time, and when, in the year 1859, at Detroit, Michigan, and at what place in Detroit. If yea, state whether you had,
366 then and there, any conversation with said John W. Medbury about the said agreement endorsed upon the mortgage in suit. If yea, state how you came to have said conversation, and what passed between you and said Medbury at that time about the said agreement. State what Medbury said with particularity.

Forty-ninth int. State what buildings were upon the property at the time you sold the same to Medbury & Aldrich, and state whether or not the said buildings, or any of them, during the time the said Medbury & Aldrich had possession of the said premises, were destroyed by fire. If yea, what buildings, and of what value?

Fiftieth int. State whether or not, said Medbury & Aldrich paid, or kept paid at the proper time, the taxes upon all of said lands. If nay, state whether or not said lands, or any of them, have been sold for taxes; and whether or not tax deeds have been issued upon said lands, or some of them.

Fifty-first int. State, whether or not, the said Medbury & Aldrich paid promptly at any time the installments as they became due upon their mortgage; or how, or in what manner they paid; and state what efforts you made, and were compelled to make, in order to obtain the payments they did make.

Lastly. Do you know of any other matter or thing which may be of benefit or advantage to the parties of this suit. If yea, set forth the same fully and at large in your answer to this interrogatory.

FINCHES, LYNDE & MILLER,
Sol'rs for Def't.

367 Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. Stevens, and Edward P. Whaling,
vs.
ISAAC N. SWAIN.

And now come the said complainants, by N. C. Gridley, their solicitor, and objects to the interrogatories addressed to Isaac N. Swain, numbered 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 44, 48, 49, 50, and 51st, for the reasons that the same are incompetent, irrelevant, and immaterial.

And the said complainants, not waiving their said exceptions, join in said commission to be issued to Addison Mandell, esq., of Detroit, Michigan, to take the depositions of Isaac N. Swain & Philo Parsons, and propound to the said witness, Isaac N. Swain, the following cross-interrogatories:

First cross-interrogatory. Did you ever, at any time, receive from John W. Medbery or James F. Aldrich, or either of them, or from any other person, or other source, for or on account of the said Medbery & Aldrich, or either of them, any policy or policies of insurance upon the saw mill built by Medbery & Aldrich, at Watervleit, Michigan, whether separately insured, or insured in connection with other insurable property, at Watervleit, Michigan? If yea, state when, where, from whom, how received, in what insurance company or companies, and for what amount or amounts. Have you stated all that you ever received from any person, or from any source for or on account of said Medbery & Aldrich, as aforesaid?

Second cross-interrogatory. What was the largest amount
368 of insurance that you procured in any one year upon the saw mill built by Medbery & Aldrich? Did you procure such insurance separate and distinct from other insurable property, belonging to Medbury & Aldrich, at Watervleit, Michigan?

Third cross-interrogatory. Did you ever request of Medbury & Aldrich, or of either of them, the privilege of procuring for them, or on their account, insurance upon said saw mill, in insurance companies to be selected by you? Did you object to any of the insurance companies in which Medbury & Aldrich had procured said mill to be insured, or to the amount or insufficiency of insurance; if so, when, where, and in what insurance companies?

Fourth cross-interrogatory. Did you render an account to Medbury & Aldrich, or their assigns, or either of them, of the first amount, and any subsequent amounts of insurance premiums paid by you, in obtaining insurance upon the saw mill, and other insurable property of Medbury & Aldrich, at Watervleit, Michigan; if yea, how often; when; to whom; what was the amount of insurance premiums paid by you; and in what years, and to what insurance companies? Did you charge and exact interest upon such payments of insurance premiums; if yea, what amount of interest, and by whom, and when was the same repaid to you? Did Medbury & Aldrich, or either of them, repay to you such insurance monies advanced by you, and interest thereon; if yea, when, where, how often, and what amount?

Fifth cross-interrogatory. Where you present at the saw mill built by Medbury & Aldrich, at Watervleit, Michigan, during the spring or summer of the year 1856; if yea, when, where, and how often? Were you at said saw mill at one or more times after
369 the building of said mill was commenced, and before the same was completed, or in running order, or sawing lumber? Were you at said saw mill after the same was in running order, and when, for the first time?

Sixth cross-interrogatory. Did not Medbery & Aldrich, after the erection of their said saw mill, provide a place or shop in, or in connection with said mill, under cover, for the use of your deaf mute brother, with water power to drive the necessary machinery thereof, and did not your said deaf mute brother occupy and use such shop or place so provided by Medbery & Aldrich? How old is your said deaf mute brother?

Seventh cross-interrogatory. Are you a mechanic, carpenter, or wheelwright by trade? If yea, which, and how long have you been such? Have you built or superintended the construction of saw mills and machinery therefor, run by water power? If yea, of how many, when, and where? Do you consider yourself an expert in the building of saw mill run by water power, and in reference to the machinery appertaining thereto?

Eighth cross-interrogatory. What is necessary, in your opinion, to constitute a first class saw mill? Speak particularly in reference to the size, construction, and amount, and quality of machinery.

Ninth cross-interrogatory. Could not a saw mill be built that might fall short of your estimate, and yet be considered a first class saw mill?

Tenth cross-interrogatory. In your estimate of the size of the mill as built by Medbery & Aldrich, have you included the platform? Is not the platform connected with, or joined to, that part of the build-

ing that you call the saw mill proper? Is not the upper and
370 lower floor, or either of them, of the platform, on a level with, attached and connected to the floor of, what you consider, the saw mill proper? Does not a part of the same timbers that support the saw mill, also support, in part, the platform? What was the use of the platform? If the mill, as built by Medbery & Aldrich, had not the platform connected thereto, where, in, or about said mill could the lumber as sawed, have been piled, assorted, and run out, and from what point shipped from said saw mill?

Eleventh cross-interrogatory. How many gangs of saws were contained in and used in the saw mill as built by Medbury & Aldrich, how any edgers, and how many machines for cutting laths and pickets? Were there also jack works for hauling logs into said mill, and how many? What was the cost and value of each machine? Where were the jack works placed, on the up or down stream side of the mill? What was the distance from the up stream side of the mill to the saw gangs? What amount of space is required for similar saw gangs in length and breadth, in feet, to run a gang of saws? Would two or more gangs of saws require each the same space in length and breadth, as a single gang, if placed side by side?

Twelfth cross-interrogatory. If a mill had been built by Medbury & Aldrich, of fifty feet in width, by one hundred and fifty feet in length, up and down stream, please state, with particularity, what use you would have made of the balance of the room in the length of such a mill, after deducting the space necessary for the jack works, and for running the saw gangs?

Thirteenth cross-interrogatory. If a mill had been built by
371 Medbery & Aldrich, of fifty in width by one hundred and fifty feet in length, up and down stream, and only seventy-five feet in length had been put under cover, would you have considered such a mill, a saw mill, fifty by one hundred and fifty feet?

Fourteenth cross-interrogatory. Is it not considered best for lumber, immediately or soon after it has been sawed, to pile it where it can be exposed to air, sun, light, and rain?

Fifteenth cross-interrogatory. Could the same amount and kind of machinery have been placed in, and used to advantage, in a mill fifty by one hundred fifty feet, as was contained and used in the saw mill built by Medbery & Aldrich? If yea, where and how would you have placed such machinery? What amount of space in width and length would each machine require?

Sixteenth cross-interrogatory. Could more than two gangs of saws have been placed in, and worked to advantage, in a saw mill fifty by one hundred and fifty feet, up and down stream, built upon same premises as mill built by Medbery & Aldrich? If yea, how would you have carried the water to the third gang of saws without interfering with the other saw gangs? State particularly. Where would you have placed the third gang of saws?

Seventeenth cross-interrogatory. What were the kinds, dimensions, and the quantity of the lumber used in the building of the saw mill as built by Medbery & Aldrich, with, and without, the platform;

and what was the price and value per thousand feet of each kind of lumber so used at the mill, Watervleit, Michigan, during the time said mill was building? How much more lumber in kind and quantity would have been required to have built a mill fifty by one
372 hundred and fifty feet, if all under cover, and if only half in length under cover, how much?

Eighteenth cross-interrogatory. How do you make up your estimate of the value of a mill fifty by one hundred and fifty feet, in answer to the 35th direct interrogatory. How do you make up your estimate of the saw mill as built by Medbery & Aldrich? Do you include the platform in such estimate? What was the probable cost and value of such platform?

Nineteenth cross-interrogatory. What was the capacity as to sawing lumber, of each of the gangs of saws as contained in the saw mill as built by Medbery & Aldrich? How many thousand feet per day?

Twentieth cross interrogatory. If a mill had been built by Medbery & Aldrich, of fifty feet by one hundred and fifty feet, where would you have piled, assorted, and run out, the lumber as manufactured by said mill?

Twenty-first cross-interrogatory. What was the immediate cause of the condition of the saw mill, built by Medbery & Aldrich, as described by you in answer to the 46th direct interrogatory? State whether or not such condition, and apparent destruction of said saw mill property was occasioned by a freshet which occured upon Paw Paw river, or the river upon which said saw mill is situated. When did such freshet occur? Did not such freshet break away the dams above said mill, and were not the wheels and other other machinery connected with the water power of said mill broken thereby? Who were in the use and occupancy of said mill at the time of such freshet? Was not said mill abandoned after such freshet? Was there any manufacturing of lumber by, or in, said mill after said freshet,
373 and prior to the purchase thereof at mortgage sale?

Twenty second cross-interrogatory. Are you still interested in the saw mill and other property formerly belonging to Medbury & Aldrich, at Watervleit, Michigan? Is said mill now in running order? What kind and amount of machinery is now used in said mill? What, in your opinion, is the present value of such mill and property?

N. C. GRIDLEY,
Compl'ts Sol'r.

Cross-interrogatories to be propounded to Philo Parsons, of Detroit, Michigan.

First cross-interrogatory. Can you state of your own knowledge that the defendant, Isaac N. Swain, was not at or in the village of Watervleit, Michigan, at any time during the spring or summer of the year, 1856?

N. C. GRIDLEY,
Compl'ts Sol'r.

374 Circuit court of the United States in and for the district of Wisconsin.

STEPHEN H. SEAMANS, CATHARINE M. Stevens, and Edward P. Whaling, *agst.* ISAAC N. SWAIN.

Deposition of Isaac N. Swain, a witness sworn and examined in the above-entitled cause, on the part of the defendant therein, upon interrogatories and cross-interrogatories hereto annexed, and under and by virtue of the commission issued by said court, hereto annexed.

The examination of said witness was commenced on the nineteenth day of June, A. D. eighteen hundred and sixty-five, and taken at the office of Addison Mandell, the commissioner named in said commission, in the city of Detroit, Wayne county, Michigan.

Isaac N. Swain, a witness produced, sworn, and examined on the part and behalf of the defendant, doth depose and say as follows, viz :

First. To the first interrrogatory he says, that he is the defendant in the above-entitled cause; that he now resides in the township of Spring Wells, county of Wayne, and State of Michigan, and that he knows said John W. Medbury and James F. Aldrich.

Second. To the second interrogatory he says, that he did, on or about the twenty-eighth day of September, A. D. eighteen hundred and fifty-four, enter into a written contract with said John W. Medbury and James F. Aldrich, in and by which he agreed to sell to them a large quantity of real estate in the counties of Van Buren and Berrien, in the State of Michigan; that he has said written agreement in his possession, and annexed the same to this, his deposition, marked as "Exhibit A, No. 1," and makes it part of his answer to this interrogatory.

Third. To the third interrogatory he says, that after the making of the said contract marked "Exhibit A, No. 1," he did have an additional contract drawn and endorsed upon the said original contract, which is marked as "Exhibit A, No. 2," and is the same included in the said agreement annexed, marked "Exhibit A, No. 1."

375 Fourth. To the fourth interrogatory he says, that there was standing upon the premises, described in said contract, a building commonly called "the shop" or "shop building," which was, at the time of the making of the said contract, used and occupied by Russell Swain, the deaf and dumb brother of said defendant. Said shop building was twenty-four feet by thirty feet (24x30) in size, two and a half stories in height, or one and a half stories above the basement; built of wood, with large and strong timber in its framework; well clapboarded and shingled; floored and lighted, and mostly sealed up on the inside, for warmth as well as for appearance and strength. Said shop stood then near Main street, and just below what was then called the "old saw mill," which was afterwards taken away by said

Medbury and Aldrich. Its longest way was nearly north and south. which brought its front, into which was its main entrance, into the first story above the basement, somewhat angling to Main street, which bears considerably to the east of a north course. Attached to and in connection with, and for the uses and purposes of, said shop, was a water power of about twenty or twenty-five horse power, then (when said contract was entered into) in good condition and successful operation. The water for said power was brought from the flume to said "old saw mill," and under the same, in a low, depressed, and tight trunk, about three and a half feet square inside, made of planks, and strongly clamped with timbers to the flume, which flume was about six feet by fifteen feet in size, belonging to said shop, which was situated at the northeast corner and outside of said shop, and partly between it and the said old saw mill, from which latter flume was driven the water wheel that afforded the power for said shop. The water wheel was outside of said shop, at the north end, enclosed and roofed over by itself, although attached to and adjoining said shop. The water wheel was about ten feet in diameter, undershot with buckets about six feet in length, its main shaft entering into the basement of the shop, on which shaft was the pit or king pulley, from which pulley led a large belt to a pinion pulley on a line shaft running nearly the whole length of the shop in the basement, on which was a drum and several driving pulleys, with belts leading to the various kinds of machinery—all of which were in successful use at the time of entering into said contract, said exhibit A. Said shop building and water power were built and arranged about the year eighteen hundred and forty-five or eighteen hundred and forty six, at least a short time before said defendant came into the
376 possession of said property, which was in the latter part of the year eighteen hundred and forty-seven; it was built and the water applied and used for a planing mill and sash and blind factory, and was for several years, including the time before and after said defendant bought said property, successfully used for that purpose; after which the planing, sash, and blind machinery (which the defendant never owned) were taken away, and said defendant allowed his said deaf and dumb brother to put into said shop his machinery, and use it for a machine and workshop, which he did, working mostly for said defendant up to the time when said contract of sale of said *of said* property was made a aforesaid, using the same amount of water, water wheel, shafts, pulleys, &c., as before mentioned, and even more, and in a better condition. Said Russell Swain had in said shop, at the time of making said contract as aforesaid, and in good order and condition, and in successful operation and use by him, one iron lathe for turning, drilling, and fitting up iron work in great variety; another lathe for turning wood, all kinds of work, both large and small; two circular saws for both large and small work; one boring and one morticing and tenoning machine, and two grind stones, all propelled by said water power; together with an abundant and great variety of tools of almost every kind to work with in said shop, for both iron and wood.

Fifth. To the fifth interrogatory he says, that his said deaf and dumb brother, Russell Swain, was an excellent mechanic and machinist, and of great ingenuity and skill in the use of said machinery, in both planning work and in the use of tools, and in making and opeating machinery; that he was a very industrious man, but unable, from his infirmities and being lame, to perform out-door labor, but from his peculiar turn of mind and his industrial pursuits, he was enabled to occupy his time advantageously and to earn a good livelihood, and support himself by means of said shop and its machinery.

Sixth. To the sixth interrogatory he says, that prior to and before the execution of said contract, he had planned and contemplated building a another saw mill upon the said property, to be in size fifty feet wide by one hundred and fifty feet long, and two full stories in the clear, above high water below; the water wheels proposed and planned to be put in and used to drive all necessary machinery for the same, were to be two breast or pitch back wheels, set abreast of each other across the mill, and just within the upper or eas-
377 terly end of the same; each wheel to be twelve feet in diameter and about twenty feet long, so constructed as to run together or separately, and with pit pulleys or gearing on them to drive one main line shaft having pullies upon it sufficient to drive all the machinery in the mill, in whatever place located. It was to have had three gangs of saws, and one six feet circular saw for making lumber from logs, together with all necessary cut off and edging circular saws, and lath and picket saws, and a planer, the last mentioned saws and planer to be located in a large room about fifty feet by one hundred feet in size, situated in the lower story, and below (that is down stream from) the wheels and gearing room, which latter, with the flume or bulkhead of water, was to have occupied the balance of the lower story; being, therefore, the room or space of about fifty feet square. Said mill was designed and intended to saw from the logs, and prepare for market about one hundred thousand feet of lumber in a run of twenty-four hours, fully and properly attended.

Seventh. To the seventh interrogatory he says, that there were two saw mills, at the time said contract ("exhibit A") was made, upon said premises described in said contract. One was a single saw mill, which was, soon after said contract was made, taken down and removed by said Medbury and Aldrich, to make room for the large saw mill, as described in this witness' answer to the foregoing sixth interrogatory, and the other saw mill was a large ~~saw~~ double saw mill forty feet wide and one hundred and ten feet long, standing on the north side of the mill tail race on said premises; and that there was an abundance of room or space between said double saw mill (which is still standing there) and the said shop then occupied by the said deaf and dumb brother, said Russel Swain, for the construction of said new saw mill of the said contemplated dimensions, and not have interfered at all with the said shop of his said brother.

Eighth. To the eighth interrogatory he says, that the shape, size, and plan of said new saw mill, and the kind of machinery to be used

therein, were talked over and discussed between said defendant and said Medbury and Aldrich a great deal.

Ninth. To the ninth interrogatoay he says, that said Med-
378 bury and Aldrich at that time expressed themselves to him as being satisfied and well pleased with the entire plan, shape, and size of said contemplated new mill and the machinery to be used therein, as then talked over and discussed; and stated to him that they were willing to engage to build and construct such a saw mill in case they bought the property. Defendant is quite sure the entire plan of said saw mill was talked over and agreed upon.

This defendant was anxious, even though he should dispose of said premises, to have such a saw mill constructed there, for one reason that he had himself been three or four years engaged in designing and planning it, and had travelled abroad into the States of New York, Pennsylvania, and Maine, and the Canadas, to see some of the best mills in those localities, and inform himself concerning them, and the said plan, shape, and size, and machinery, were what he had adopted as the best for that location, and he would have built it there himself before that time, had it not been for his own and his wife's poor health, and other family afflictions.

And another reason why he wanted such a mill there was, that he believed its success would greatly benefit the place, because he still retained a large quantity of land adjoining and about the place.

And another and great reason for his requiring, as one of the conditions of said sale, that they should agree to build such a saw mill there was, because of the small amount of the purchase money they proposed to pay down, and the long time in which they wanted to pay the balance, the property in the meantime being liable to extraordinary hazards from fire and floods, and capable of being rendered in a very short time of very little value by stripping of timber, waste, &c. He therefore wanted, and was exceedingly anxious to increase and strengthen his securities all he could. At the same time, said Medbury and Aldrich represented and stated to witness, this defendant, that the main reason why they did not want to pay down any more of the purchase money of said premises was, because they wanted to use so much money in the building of just such a saw mill there, as the defendant had contemplated building; that they were pleased and well satisfied with the shape, plan, and size, and with the machinery and location proposed; they, or at least one of them, stated that they wanted to build a saw mill there capable of sawing and fitting for market one hundred thousand feet of lumber in twenty-four hours, and witness further states that it was
379 then and there, to wit, at said Watervliet, where said mills are located, during the last week in September, A. D. eighteen hundred and fifty-four, agreed between said parties, to wit, the said Medbury and Aldrich on the one side, and said defendant on the other, both parties assenting and agreeing thereto, that said Medbury and Aldrich should commence and build there, on the location proposed, between said shop and said double saw mill then standing and in operation, without delay, said new saw mill, which was to be fifty feet

wide, north and south, and one hundred and fifty feet long, east and west, or running parallel with said double saw mill—to be two full stories in height in the clear above high water below the mill, with two breast or pitch-back water wheels, to be set abreast or on a line with each other across the said new mill below in the mill and just within the easterly end of the same—each to be about twelve feet in diameter and twenty feet long, constructed so as to run together or separately, and with pit pullies or gearing on them to drive one or more main line shaft or shafts, having belts and pullies sufficient to drive all the machinery in the said mill it was capable of doing, in whatever place it was required; there were to be three gangs of saws and one six feet circular saw for making lumber from logs, together with all necessary cut off, edging, lath, and picket circular saws, for a mill of such size and capacity, and a planing machine was talked of, but not positively agreed to be put in. There was to have been a large well lighted room finished off in the lower story about fifty by one hundred feet in size below the wheel and gearing room (down stream) for lath, picket, and all small sawing, and for planing, if a planing machine should be put in, and for various kinds of work necessary and common about any good mill, such as gumming, filing and fitting saws, making repairs, &c. Both stories were to have been well enclosed and lighted, for both day and night use, as it is common to run saw mills, driven by water especially, through the night, and for that purpose, it is quite important to have them well enclosed, that they may be well lighted for night work, and large enough inside to hold conveniently all the lumber made through the night. It was so talked and discussed at that time between him and said Medbury and Aldrich, and by them admitted and agreed to—said new mill was to have two lines of ways for saw carriages running through lengthwise of the mill, on one of which were to be two gangs to follow each other and an edger, on the other was to be the six feet circular saw for any length of timber or lumber within the mill; then another line for about two-thirds the length for the other gang, while the balance of the length of that line was to be occupied by another edger and edging table. There were to be between these several lines or ways, railway tracks, on and by means of which, with cars, were to be moved logs, cants, or bolts, and lumber, from one kind of sawing to another, and when completed, to be run out on one or more tracks to wherever the same was to be piled, rafted or shipped for market. Such was the kind of saw mill said Medbury and Aldrich then and there agreed to build upon said premises, in a good and workmanlike manner, without any unreasonable or unnecessary delay, and to locate the same between said double saw mill then standing there and said shop, which this defendant in his sale of said premises to said Medbury and Aldrich reserved for the use and benefit of his said deaf and dumb brother, Russell Swain—and such a saw mill as said Medbury and Aldrich then and there agreed to build, and as they seemed so anxious to build, and which would, if so built, have been capable of sawing nearly or quite one hundred thousand feet of lumber, when well attended, in twenty-four hours, but perhaps not that amount all the time on an average.

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Tenth. To the tenth interrogatory, he says, that he very clearly and distinctly remembers going over the spot with said Medbury where said saw mill was to be located and measuring the same with him, on or about the twenty-eighth day of September, eighteen hundred and fifty-four, Mr. Aldrich then being upon said premises, and witness believes said Aldrich was looking on when the same was done, but he cannot swear to the fact. This was at the time when the shape, size, and all the details, designs, and arrangements of said new saw mill mentioned and described in his answer to said ninth interrogatory were being talked over, discussed, and agreed on; and that again on or about the fifth day of October of said year, this witness assisted said Medbury and one Martin Ruggles in measuring the same, when the whole size and exact location were being laid out and established for the foundation of said saw mill, preparatory to the driving of the piles for its foundation by said Ruggles, who had then
381 taken the job for driving the same, and that it was then and there, by said parties, viz: witness and said Medbury and said Ruggles, measured off and decided upon for a saw mill then to be built by said Medbury and Aldrich, of the size of fifty feet by one hundred and fifty feet, on its own foundation precisely as before agreed on at the time of the sale of said premises by the witness, said defendant, to said Medbury and Aldrich, immediately previous to the making and signing the said written contract "Exhibit A;" witness had before measured the same ground and distances when making the plans for the same kind of saw mill, and of the same size which he had himself contemplated building there, and well understood it. The line for the foundation under the north side of said contemplated saw mill, was then and there, on or about said fifth day of said October, established as aforesaid eighteen feet south of the narrow part of said double saw mill, and run about east and west parallel with the same. On this eighteen feet space was an old lock, which it was necessary to avoid in order to drive piles well for the foundation, so that the said north line passed as was supposed outside of any of said lock timbers, that is south of them. The southeast corner for said saw mill was fixed under said old single saw mill, making the easterly end line at right angles with the north side line, and from said southeast corner running thence westerly parallel to said northerly line, one hundred and fifty feet to the southwest corner, which was in the stream of the tail race; the stake for which said Ruggles there stuck, going to the place for that purpose in a canoe, from thence at right angles, fifty feet to the northerly and first established line. The said south line cleared the northwest corner of the wheel house of said shop about three feet, and the northwest corner of said shop about eight feet.

Eleventh. To the eleventh interrogatory he says, that the agreement about the said new saw mill that Medbury and Aldrich then engaged to go right about and build, without any unreasonable delay, in which were stated the shape and size it was to have been, the principal machinery to be used in it, and where, and how it was to be located, and all as hereinbefore stated in his answer to the sixth

interrogatory, was, at the time of making said contract "Exhibit A, No. 1," reduced to writing, but in the great hurry and con-
382 fusion of drawing up and completing the said contract on account of the great desire of said Aldrich to leave said Watervleit in time to reach his home at Chicago on Saturday, (this being in the morning of that day,) the aforementioned agreement, as well as some other agreements of much importance, were, in arranging and putting the different agreements, first written on loose sheets, together, and in writing out the closing part of said contract, accidentally omitted and left out of said contract, which omission was first discovered, at least by this defendant, after the said contract was signed, and said Aldrich had left Watervleit for Chicago, which he did immediately after the said contract was signed, and said contract was left by said parties with this defendant, and that on the next day, when said Medbery was present, this defendant was for the first time looking over said contract, after the same was put together and signed, and then discovered that said several agreements, including that one about said new saw mill, had been omitted and left out of said contract as aforesaid, and immediately called the attention of said Medbury to the facts, and desired him to correct the same; some of said omissions were corrected by said Medbury on the next day thereafter, viz: on the second day of October, and by the consent of said Medbury, the supplementary contract marked as "Exhibit A, No. 2," was endorsed upon said first named contract "Exhibit A, No. 1," hereto appended; that said supplementary contract was signed by this defendant, and by said Medbury in person, and by said Aldrich by said Medbury, which corrected some of said omissions, but said Medbury then, at that time, objected to bind himself, and said Aldrich, particularly (laying much stress on said Aldrich's absence,) in writing, to build said large saw mill, although said Medbury then admitted that it had been omitted and left out as before stated, and that they had agreed to build said saw mill, and they intended to do so, just as they had agreed, but gave as a reason for his refusal then, that it was unnecesary as they were anxious to build said large saw mill immediately, and as desirous to build it as said defendant could be to have it done, and that he had then remained there for the very purpose, among other things, of commencing and getting it started that fall, and then requested this defendant to assist him in doing so, by way of advice, direction, and the employing of men for that purpose, &c., &c., which this defendant did do, and all for a saw mill in every particular as heretofore stated, which they had agreed to build there.

Twelfth. To the twelfth interrogatory he says, that on the second day of October, A. D. eighteen hundred and fifty-four, before and after getting possession of said mills, said Medbury did assent to and agreed to the plan of said new saw mill which said Medbury and Aldrich had agreed and then proposed to build on said premises, as it had been talked over by and between this defendant and him, and
383 said Medbury did, on that same day, before and after having possession of said mill, request and verbally authorize this defend-

ant to engage some suitable person to drive the piles for the foundation of said new saw mill, and upon the urgent request of said Medbury, this defendant did, on that second day of October, go into the town of Hartford, Van Buren county, to see one Martin Ruggles, who had driven many piles for this defendant, and whom he considered the best man he knew of to undertake and do such a job, and this witness did, on that day, see and converse with said Ruggles, about driving the said piles, and asked said Ruggles to go to Watervliet and see said Medbury about it, &c., which said Ruggles agreed to do, and did do, either on the next day or the next day but one thereafter. That said Medbury and said Ruggles talked about the driving of said piles for the foundation of said new saw mill between themselves, in this witness' presence, and they both talked with witness on that subject about the best way and manner of doing it, and about the quantity to be driven for the foundation of such a mill, and about what it would be worth, &c., and this defendant's books were then referred to, to ascertain the price which this defendant had previously paid said Ruggles for driving piles, though somewhat different from what would have to be done for said foundation, and they both referred the case to this defendant to state about what it would be worth to drive and cut them off properly, some lower than others below the surface of the water, which was necessary, and also what it would be worth to drive the piles, and not so cut them off, and how much for one or the other; to furnish the materials for the piles it would cost, and how much it would be worth, with or without the use of the said old saw mill to straighten and sharpen the piles in, &c., on all which defendant gave them his views, estimates, and prices; said Medbury then requested this defendant, as being more familiar with the subject, to draw up a contract for the driving and cutting off all the piles for said foundation, with the proper specifications for doing it in the best manner possible, for a saw mill fifty feet by one hundred and fifty feet in size, which this defendant engaged, to and with said Medbury, to do, and did do for him, in a rough written manner, which was afterwards copied by some one, agreed to by and between said Medbury and said Ruggles, and signed by them. This defendant is certain that he completed the draft for said agreement between said Medbury and said Ruggles on the fifth day of said October, with all the necessary specifications for the work, but he is not now certain that the
384 same was signed by them on that day. In said agreement it was agreed that said Ruggles was to have the use of said old saw mill for all necessary purposes about the said work, so long as it could be used, and it was provided that in consequence of the eastern end of said foundation coming on to the ground, where said old saw mill then stood, that said old mill would have to be removed before all the piles for the new saw mill could be driven, and that said Medbury was to remove said old saw mill whenever said Ruggles should require it to be removed or taken away for the purpose of driving the piles on a part of the ground where it then stood, and it was on said fifth day of October, while said Ruggles was at Watervleit, that defendant was requested by said Medbury to assist them in measuring, laying

out and fixing the site and particular location of said new saw mill, which this defendant did do as he has before stated in his answer to said 10th interrogatory.

Thirteenth. To the thirteenth interrogatory he says, that very soon after the fifth day of October, A. D. eighteen hundred and fifty-four, said Martin Ruggles, being the party employed, as stated in his answer to the twelfth interrogatory, commenced to drive the said piles for said foundation, and continued driving them, to the best recollection of defendant, until some time in the following month of December, when he suspended his work on account of severe cold weather. Said Ruggles drove said piles for a saw mill to be fifty feet wide, north and south across the stream, and one hundred and fifty feet, long east and west up and down the stream; but he did not drive piles enough for the whole foundation of such a saw mill that fall.

Fourteenth. To the fourteenth interrogatory he says, that the location selected by this defendant, which was measured off as aforesaid, and decided on by said Medberry, and upon which location said piles were driven, was abundantly large enough and exceedingly well adapted for a saw mill fifty feet by one hundred and fifty feet in size, and of the capacity and shape, and with the machinery, as was planned and agreed to be built by said Medberry and Aldrich.

A saw mill of said size and shape, built upon the foundation commenced by driving piles, as aforesaid, in the fall of eighteen
385 hundred and fifty-four, by said Ruggles, would have left the wheel house of said shop clear about three feet, and the nearest part of said shop itself about eight feet; and would not have affected the said shop building at all, nor the water privilege for it at all, unless the head or upper end of the trunk leading to said shop was changed to the head of water for the said new saw mill, which change might have been convenient for said Medberry and Aldrich, but not necessary.

Fifteenth. To the fifteenth interrogatory he says, that after the making of said written contract (exhibit A) with said Medbury and Aldrich, he remained at said Watervliet over six months; and the principal purpose and object of his so remaining there was to have said Medberry and Aldrich furnish and deliver the collateral securities on other property which they had agreed to do, and for them to be prepared to execute to him their bond and the mortgage on said premises provided for in said written contract, when the deeds to be given by this defendant should be ready for delivery.

That immediately after the execution of said contract, "exhibit A," this defendant took measures to get his wife, who was then an invalid, and in the State of Massachusetts, to said Watervliet for the principal purpose of having her there to sign said deeds, desiring that there should be no delay on his part when said Medberry and Aldrich were ready to perform their part of the contract, and close it up. That early in the month of November following, his said wife came to Watervliet, and immediately thereafter he notified said Medberry and Aldrich that he was ready to make out and deliver

said deeds when they were ready to comply with the provisions of said contract. That on the twenty-eighth day of December following, said Medberry and Aldrich came to Watervliet, and paid to this defendant the balance due him on the said first payment of ten thousand dollars, which was endorsed upon said contract. They then asked this defendant to make them said deeds, which he declined doing on their stating that they had not then the collateral securities on other property to deliver, but stated that they would have soon; and this defendant then waited for them to do so until the twenty-seventh day of March, A. D. eighteen hundred and fifty-five, when this defendant made, and caused to be properly
386 executed, the said deeds on his part, and tendered them to one Marvin A. Daley, the agent of said Medberry and Aldrich, to whom they had spoken of sending the requisite papers, on their part, to be exchanged; but said Daily stated that he had never received from any one any such papers or writings to be exchanged.

Defendant then wrote said Medberry and Aldrich what he had done, and urged them, as he had before done, to close up the transaction on their part, as he was exceedingly anxious about it, so that he could leave Watervliet, and take his wife back to New England, as her health had been rapidly failing all the time she had been at Watervliet. In reply, they wrote him requesting him to meet them at Niles on the first of April ensuing, when they would be ready to close up the matter; that defendant went to said Niles (near 40 miles) to meet them there at the time appointed by themselves; but they did not come, but sent him a letter, which he received at Niles, saying they were not ready to meet him, but would meet him at said Niles on the tenth of said April, ready to close all up with him there. This defendant then proceeded to Chicago, but failed to find said Aldrich at home, or see him at all; but obtained what he deemed reliable information from others that they would be ready and expected to meet him at Niles on the tenth of said April, and defendant returned to Watervliet.

This defendant says that he did see said Medberry at Watervliet in the forepart of that winter; that said Medberry and this defendant did have much conversation together about said new saw mill, about the best way and manner of building it, &c. Defendant did not hear said Medberry object to any part of the plan, shape, size, or location of said new saw mill. This defendant did once, about the first of January, eighteen hundred and fifty-five, hear said Medberry make some complaint about the shop. It was in this way: the said deaf and dumb brother of defendant had then frequently complained to him about said Medberry and Aldrich's men employed in and about the mills having frequently entered his shop and taken away his tools without his permission, some of which he had never been able to recover, while many that he did recover were very much injured, and this defendant requested said Medberry to speak to his men about it, to which said Medberry replied, manifesting
387 some feeling, that he thought there had not been many tools

taken away that had not been returned again, or words of like import. This defendant then asked said Medberry if what this defendant had heard was true, that he, said Medberry, had said that he meant to get rid of that shop some way; to which said Medberry made no reply to this defendant, either admitting or denying the said report; but he did say that he did not care much about the shop, only he thought it took more water to run it than was necessary, or words to that effect.

And defendant left said Watervliet in the spring of the year eighteen hundred and fifty-five.

Sixteenth. To the sixteenth interrogatory he says, that he left Watervliet on the seventh of April, eighteen hundred and fifty-five. He first went to Paw Paw, Van Buren county, where he left his wife, and on the ninth of said month went to said Niles, to meet said Medberry and Aldrich there on the tenth of said month, according to their appointment; but they did not come to meet him there. He then telegraphed to them at Chicago, to know if they were coming, and received a reply requesting him to come to Chicago. He went there on the eleventh, and met them at Chicago on or about the twelfth of that month of April. Said Medberry and Aldrich were then owing to this defendent for logs and lumber sold them by defendant, for cash and other advances made to them by him, and for other logs belonging to this defendant, &c., over six thousand two hundred and sixty dollars, on which, after great effort, he received of them about two-thirds of that amount; and the balance thereof they agreed to remit to him after they had been to Watervliet and ascertained about what quantity of logs belonging to defendant they had taken and sawed not previously purchased; that is, logs cut and put into the river during the fall and winter after the sale of other logs to them specified in said contract, which logs, taken and sawed by them, as aforesaid, were cut from other lands of this defendant not sold to Medberry and Aldrich, and were scaled and measured by agents of defendant.

Defendant further says, that it was during this visit to Chicago, and on or about the fourteenth of said April, that he finally gave to said Medberry and Aldrich the deeds for the property sold to them at Watervliet, according to said contract, (exhibit A,) and received from them their bond and their mortgage upon said property;
388 a true and accurate copy of said bond and mortgage are hereto annexed, marked respectively "exhibit B" and "exhibit C," and also received from them, as the collateral security on other property mentioned in said contract, the mortgage executed by said Medberry, and Mary R. Medberry, his wife, in reference to which this present suit is brought, which mortgage is attached hereto, and marked "exhibit D."

This defendant also states, that after said collateral security had been agreed upon, viz: the mortgage ("exhibit D") upon the one-third of the Empire mills and the lots in the city of Milwaukee, described in said mortgage, and said mortgage had been written, and while waiting for Mrs. Medberry to sign the same, and after the

words "and the large saw mill to be built" had been interlined in the said mortgage, "exhibit C," executed by said Medberry and Aldrich, and their wives, on the premises sold to them by defendant as aforesaid, at Watervliet, said Medberry represented to defendant that they, said Medberry and Aldrich, contemplated making large improvements at Watervliet; that they intended very soon to build there a large flouring mill; and that they also intended, right away, to put a steam tug and flat boats on the Paw Paw river, to run between Watervliet and St. Joseph, &c.; and also spoke of some other things they intended to do, and said that, perhaps, to enable them to accomplish all these things, he, Medberry, might want to raise some money, and that he, said Medberry, might, in order to do so, want to mortgage the same property specified in said mortgage, "exhibit D," in said Milwaukee; and he, therefore, asked and requested of defendant, as a special favor and accommodation to him, said Medberry, that defendant would stipulate and agree, in some way, that after the building and completion of said large new saw mill, (which he then again said they were going to build immediately, and just as it had been talked and agreed on, although he said they were very well aware it would cost much more than they expected at first, owing to the advanced price of labor and materials,) he would then release the said Milwaukee mortgage, (said "exhibit D,") which he, Medberry, was then giving as said collateral security. Said Medberry also stated what he then thought it would cost to build said new saw mill, naming some large amount, not now remembered exactly, and said he thought this defendant ought then
389 to be satisfied to do so, as he, said Medberry, thought the securities then on the premises, with the said new saw mill completed, together with the certain payment of the first installment falling due upon said mortgage on said premises, purchased as aforesaid, in addition to the ten thousand dollars paid, as aforesaid, would be ample and abundant; to which defendant replied, that it might all burn up, or be washed away by floods, if he was not there, or some one else who felt a pecuniary interest in doing so, to take care of it. Said Medberry then said, that he then thought strongly of moving there himself: that his wife was then there on her way to Watervliet with him, to see how she liked the place, and make up her mind wether she wou'd be contented to live there or not, and that he thought there was a strong probability of his going there and moving his family to Watervliet to live; that he felt a great interest in that property, and thought they should make a good deal of money out of it when they had made all the improvements they contemplated; that they would be sure and keep said new saw mill insured, as well as all the other buildings. This defendant, then, knowing that he had failed to obtain, in writing, a recognition of their obligation to build the said new saw mill, and to confine them to both the size and particular location, as commenced the fall previous by the driving of piles for its foundation, so that, on that account, his said brother's shop should not be disturbed, by confining said new saw mill strictly to the shape, size, and location, as before

agreed on, and thinking that this would be a good opportunity to do so, thereupon hastily wrote a conditional agreement on a separate piece of paper, and submitted it to said Medberry, who said that that would do, and that he would be satisfied with that, which defendant then consented might be endorsed as a condition on the back of said Milwaukee mortgage, ("Exhibit D,") which was accordingly done by their clerk, one Alson Landon, and the same was executed and acknowledged by defendant after said Medberry and wife had executed the mortgage, ("exhibit D.") There were no conditions whatever respecting said mortgage and the said endorsement thereon, except as therein specified, and said mortgage was given as collateral security for the payment of said mortgage given to
390 secure the payment of the purchase price of said premises.

That final delivery and exchange of said papers, between defendant and said Medbury & Aldrich, were made with said Aldrich, and said Aldrich at that time deliverd to defendant a certain policy of insurance, issued by the Jackson County Mutual Fire Insurance Company, No. 10,657, (which policy is hereunto annexed with other policies) purporting to insure six thousand dollars on buildings then on said premises at Watervleit, when the premises were sold to them, viz: on grist mill, two thousand dollars; on saw mill, two thousand dollars; on store, two thousand dollars, which was then duly assigned by said Medbery & Aldrich to defendant, and which was the first insurance policy this defendant received from them on any of said property sold then. This defendant thereupon expressed himself to said Aldrich as being acquainted with, and as not having much confidence in said insurance company. That immediately after the exchange of said writings defendant left Chicago for the east, by way of Paw Paw, for his wife, stopping at Jackson, where said insurance company had their office, for the purpose of getting the required consent of said company to the assignment. On making the application for such consent at said office, defendant was informed by its secretary, Mr. Dyer, that said policy was not good or binding upon the company, refering to section 3 of their conditions of insurance, on account of the premium not having been paid, but afterwards did consent to the assignment, saying that defendant would have to take the chances until actual payment of the premium was made. This defendant then immediately wrote to said Medbury & Aldrich informing them how the matter of this insurance stood, and that in fact this defendant had no insurance at all upon any of the insurable property, and requesting them to attend to it at once; also to obtain proper insurance on the other buildings, and to forward the same to him, giving them his address. But this defendant never received any reply to his letter, or any further insurance on said mills or other property during the year eighteen hundred and fifty-five. That defendant, during that year, wrote to said Medbery & Aldrich several times about their keeping their engagements good in that behalf, but without success.

391 That defendant then proceeded to the States of Massachusetts and Rhode Island, stopping for short periods in various places, as the health of his wife required; that he travelled about in

the Eastern States with his wife, and for her health, until about the thirteenth of September of that year, when this defendant and one Galen M. Fisher, while in the city of Boston, purchased a large amount of property in the village of Palmer, in said State of Massachusetts, where, in the latter part of said month of September, they commenced trade together under the firm name of Swain & Fisher, in the flour, grain, and general produce business, in which they were engaged until in the month of January, A. D. eighteen hundred and fifty-six, and afterwards, that in said month of January, said defendant left said Palmer and returned to the State of Michigan, for the first time after leaving it as aforesaid, in the month of April aforesaid, and he arrived at said Watervliet on the twentieth day of said January, which was the time of his first return there after leaving said Watervliet on the said seventh day of April preceeding as aforesaid.

Seventeenth. To the seventeenth interrogatory he says, that prior to his leaving Watervliet in the month of April, in the year eighteen hundred and fifty-five, no work had been recommenced in that year upon the foundations of said new mill to his knowledge.

392 Eighteenth. To the eighteenth interrogatory he says, that after leaving said Watervliet, in the spring of the year 1855, he first returned again to the State of Michigan, and visited Watervliet for the first time thereafter on the twentieth day of January following; that the principal purpose and object of his then returning to Watervliet were to obtain a settlement with said Medbery and Aldrich for certain logs that they had taken from the river and sawed, belonging to the defendant, and of which they had rendered an improper account, as well as other unsettled accounts that defendant had against them, and especially for the purpose of trying to get pay from them of the first installment due him on the previous twenty-eighth of September on said bond and mortgage, Exhibit B and C, they having dishonored defendant's draft upon them for the amount, and refused and neglected to pay to Messrs. S. J. Surdam & Co., of Chicago, to whom this defendant had sent said bond, with authority to collect & endorse thereon any amount they could collect of them, and they had neglected to reply to his repeated letters to them on that and other subjects, so that this defendant felt himself forced to leave his business at said Palmer, at great inconvenience and sacrifice, to go and try to get his pay from them, and a settlement with them, if he could. And for the further reason that he had heard that the shop of his said deaf and dumb brother had been removed from its former position, contrary to the express agreement of said Medbury and Aldrich, and its usefulness destroyed, and he wanted to do something about having said shop restored to a proper condition.

The reason for this defendant going to Watervleit at that particular time were that he had been informed, by letter from there, that said Medbery and Aldrich were expected at Watervliet about said twentieth of January, and he was particularly anxious to see them at that place, for the purpose aforesaid, and that said improper accounts could be more easily investigated there than elsewhere.

That after his arrival at Watervliet as aforesaid, on this visit, and

not finding either said Aldrich or Medbury there, he wrote
393 them on the *the* twenty-second of that month, at Chicago, that he was at Watervleit; that he had come from Massachusetts to attend to his business with them, that he wanted his pay on said first installment without recourse to law, to avoid which their immediate attention was necessary, or words to effect, to which, and other letters that he wrote them from that place, he received various apologetic replies, and finally on the eighth day of February, of that year, (1856,) he received from them, by remittances through one J. S. Stewart, nearly the whole amount of said installment, and endorsed the same on that day on said bond; and on the ninth day of said February, he wrote to said Medbery & Aldrich again very plainly on the subject of said log and other accounts, about the destruction of said shop & the said saw mill they were building there, strongly protesting against them both, and calling their immediate attention to their delinquency in payment of taxes on said property, and on the subject of insurance, of which defendant then had none, and asked them to come to Watervleit then, and settle with him there, where the matter could be best explained and understood, and at the same time arrange properly about said taxes, insurance, shop, &c., &c., and requested them to write to him at Detroit what he could depend upon, and if they would meet him at Watervleit he would immediately return there for that purpose.

Defendant left Watervleit for Detroit on the fourteenth of said February, and remained there about ten days, but did not hear from said Medbury and Aldrich as requested, and he then returned to Watervliet, where he arrived on or about the twenty-fifth of that month, when he again wrote them to come and settle with him there.

Defendant waited for them at Watervleit until the eighteenth of March following, and getting no answer to his requests from said Medbury and Aldrich, he went to Chicago on or about the twenty-first of said March, and on the next day saw said Aldrich, and had much conversation with him about the delinquences of said Medbury and Aldrich, &c., which said Aldrich there promised should be
394 attended to, although he said that he depended upon said ~~Aldrich~~ Medbery to attend to the details of the Watervliet business, and that it must be done at Watervliet, and that he and said Medberry would meet this defendant at Watervliet for that purpose on the twenty-fifth of said March, upon which assurance and promise, defendant then returned again to Watervliet, but they failed to meet him there at the time appointed. That on the twenty-seventh of said March, defendant left Watervliet with the intention of going to his home and business at Palmer, Massachusetts, but concluded after starting, to go again to Chicago, which he did, and learned that Aldrich was about home, and after many fruitless attempts defendant finally succeeded in seeing him. Aldrich apologized, and said that Medberry had failed to go with him as agreed, and that he knew it would be of no use for him to go there without Medberry. He said that Medberry was then away from home, and that as soon as possible after his return they would go to Watervliet together, and attend to

all the delinquent matters, look up and correct the said log account &c., remit what was justly due to this defendant to him, and would write him at Palmer, what they would do about the said shop. That defendant finding that he could not accomplish much in this way, and learning that Medbury and Aldrich had pressing business of their own, that would require them to go to Watervleit to attend to it, he took formal leave of said Aldrich under repeated assurances from him that all the matters of this defendant should be faithfully attended to, and to his entire satisfaction. That defendant did not leave Chicago for the east as said Aldrich had expected, but remained there for the purpose of ascertaining the movements of said Medberry & Aldrich until the second day of April, without the knowledge of said Medbery & Aldrich, when he learned that they had gone to Watervliet, and started himself immediately for that place, and found them both there, that he immediafely commenced with them on the sub-
295 ject of the log and other accounts, and after much difficulty, effected an arrangement of the log, and some of the other accounts, which was that said Medberry and Aldrich should give him their draft for seventeen hundred and thirty-five dollars and fifty-four cents, on James F. Aldrich, of Chicago, at ninety days, which was a sacrifice on the part of the defendant of about three hundred dollars. Said Medberry & Aldrich then again agreed to pay up the delinquent taxes, and obtain the insurances on the buildings as provided in their mortgage, to this defendant, on said premises at Watervliet, and assign them over at once as therein provided to this defendant. This settlement and the said draft were made on the seventh of said April, in the store of Messrs. Daly, Aldrich & Co., at Watervliet, and immediately thereafer this defendant spoke to said Medberry, and said he, this defendant, wanted to talk with him, whereupon this defendant and said Medberry walked out of said store together and down the hill on Main street toward said new saw mill, then being built by said Medberry and Aldrich, until they arrived within about four or five rods of said new saw mill building, and immediately in front, and in plain view of the wreck of said shop, as well as the said new saw mill building, where they sat down together on a saw log, and there had a long talk or conversation—a great deal was said between them—the commencement of this conversation there this defendant very well remembers, but he cannot remember near all that was said. For a few moments after sitting down nothing was said, then this defendant, raising his forefinger and pointing towards the wreck of the shop, said, "~~Medley~~ look at that wreck—all that is left of that nice comfortable shop that you know I ~~was~~ very particularly reserved in the sale of this property to you for the especial benefit and livelihood of my poor unfortunate brother who cannot speak a word for himself," &c., and after a pause, no reply being made, this defendant went on and rehearsed most of the circumstances concerning the reserve of the shop, and the said new saw mill they were building, in
296 comparison with the one first planned, and which they agreed to build, &c., &c. At length, said Medberry replied, first in regard to the shop, that after deciding to build said saw mill in the

Medbery

shape they had, they found that the shop would be some in the way, and concluded they might as well move it then and have it out of the way of other improvements which they then contemplated doing the same as they had before, and that they let the job of moving it to the man who was to build their saw mill building, who was only to move it back and a little south sufficient to get it out of the way, but that the man (Pidge, this defendant thinks he called him) moved it further than he was directed to, and left it in a different condition from what he agreed to, and said it might easily be got into timbers again, and run back part way towards the street. Said Medberry said he did not know as he was to blame about it—that if the man had moved and left it where, and as he ordered him, or as he agreed to, (defendant is not sure which he said) that there would have been no difficulty in soon putting it up again. He admitted that it was wrong and shameful, the way it been injured and left. The defendant asked him where the lower story or basement, water wheel, wheel house, flume and trunk were, to which he replied that he did not know, and said that such things got scattered and destroyed, where there are so many at work, and pointing, to a large pile of rubbish of old lumber, timber, bark, shavings, &c., said, that probably they were there, or else scattered around somewhere. The defendant asked him when they were agoing to fit up the shop again, and restore it to its former condition, and where his brother could have the same use of the shop and the privilege of water as before, and said that his said brother had been deprived of it entirely nearly a year, and that he thought there was unnecessary delay about it, &c., &c. To which said Medbury replied that he did not know; the water he said could not very well be supplied to it until they got their new saw mill running,

397 meaning that it would have to be taken from the head of water that supplied that mill, as he pointed out where it would have to be taken out, at the side and near the front of said mill. This defendant said that he wanted this matter arranged now, while he and they were all here together, and that the shop and privilege of water must be restored to his said brother without further unnecessary delay.

In reply, said Medberry asked this defendant how his said brother would like to have room in the basement of the new saw mill, and that when they got said mill running, said brother could throw his driving belt on to a pully on their shaft, and asked this defendant to go down with him and see how it could be arranged, &c. To all which this defendant replied decidedly that there was no use to see about it, for he knew very well that it would not do at all and stated many reasons why, and added that if they had built the new saw mill as first planned and agreed to be built by them, that there would have been one large dry room, or several rooms in the basement or lower story, good for almost any purpose, and that the mill would have been worth more than two such as they were building, or in words to like effect and meaning.

This defendant also then and there protested against the change in the shape, size, and plan of the mill as a violation of the agreement

in the first place, and their assurances afterwards. Said Medberry claimed that they had a right to alter the plan if they saw fit, and intimated that he did not see why it need concern this defendant so much, certainly so long as they built a good mill there, and made as they were going to do other improvements, and kept the security good, made thei rpayments and finally paid for the property, as they should do. This defendant said he thought agreements ought to be good for something. Said Medberry then said he did not consider there was any binding agreement about it, and he thought they had a perfect right to manage their own business as they pleased,
398 and that this defendant had no reason to find any fault if they built a good mill there worth as much or nearly as much, with other improvements to equal it. This defendant replied, it was his business when they violated their agreements and thereby damaged him as they had done in their destruction of said shop, and defendaat charged him that he believed they had altered the shape, size, and location of said saw mill on purpose to have an excuse to move and destroy said shop, and that now something must be done about it, or he would at once commence suit against them, to obtain his rights. And that he then wanted to know whether they would restore said shop and its privileges to as good a condition as before they moved it or not. Medberry then said and agreed that he would see his partner, Aldrich, about it, and let this defendant know what they would do—and thereupon said Medbury went into the said new saw mill building, and from that moment said defendant has never seen either said Medberry or said Aldrich at Watervliet. Defendant remembers these facts distinctly from memoranda made in his diary which he then kept and has now in his possession, and also the day following in a letter to his wife detailing the facts. That on or about the eighth day of said April, or soon after said conversation, said Medberry and Aldrich suddenly left said Watervliet for some place unknown to this defendant, and defendant was thereby prevented from getting personal service on them, in a suit he had contemplated commencing for damages to said shop, and other good cause of action against them; that on the next morning the ninth of said April, defendant endeavored to overtake them, but was prevented by the bad state of the roads from doing so; defendant intending to commence suit against them, and returned to Watervliet. On the tenth, eleventh and twelfth days of said April, defendant was engaged boxing up goods and books to take away with him, and on the thirteenth
399 day of said April, this defendant left said Watervliet for his home at said Palmer, in the State of Massachusets; that he was delayed a short time at Detroit, on his way home, by business engagements with Philo Parsons, at Detroit, and took from him a certain receipt hereto annexed, marked "Exhibit O," and after stopping at several places on the way, arrived at said Palmer, on the seventeenth day of April, A. D. eighteen hundred and fifty-six. This defendant states positively that, from the seventeenth day of April, A. D. eighteen hundred and fifty-six, until the twenty-third of September thereafter, he was not away from said Palmer, any two full

days together at any time, and that within those dates he was not within the limits of the State of Michigan. That after arriving at Palmer, he was engaged in carrying on the business of Swain and Fisher there, and in planting shrubbery and fruit trees, and fitting up grounds for a residence there, on which he contemplated building, which business occupied all his time during that period.

Defendant further says, that on his arrival at said Watervliet, on said twentieth day of January, in said year eighteen hundred and fifty-six, he first saw said saw mill building, then built or being *being* built by the said Medberry and Aldrich, although he paid no particular attention to it then, and he also saw said shop, or what remained of it in sight, which he had reserved for his said deaf and dumb brother; but defendant did not go into said mill building until Saturday the twenty-six day of said January, and then merely to collect an account against a person who had gone in there. Defendant was very much dissatisfied with the appearance of things there, and waited for the arrival of said Medberry and Aldrich; that he felt no desire to go into said mill as his said brother had informed him all about it, and he was thereby about as well informed concerning it as if he had examined it himself. That at the time of going into said building as afore-
400 said, he did not pay much attention to it, but he thinks there was not much done in the way of putting in the machinery. He recollects going again into said building about a week or so after this to see some one, but is unable, from any data, to state the exact time or any particulars about the state of the work at that time. The building, itself, was then up and enclosed on the east and south sides about as it has been ever since, sixty feet square on its foundation, the upper part projecting over some eighteen feet on to another wall, and he was not then aware of their being any platform to it. As to the condition of said shop, he says, it was then he saw what remained of said shop, which was only the upper part of it, which had been, as he had been informed and believes, by order of said Medberry and Aldrich, or one of them, cut off from the basement, which was then destroyed and gone, and the said upper part removed to an almost inaccessible place, from five to seven rods away from its former location, and removed thus far from any water power, from which it could and did formerly derive its principal value; its trunk, flume, water wheel and wheel house, and the other machinery gone and destroyed; said upper part being all that this defendant could then see, there left in a tipped up, wrecked, and ruined condition, where, and as it remained when this defendant last saw it about a year ago this time. That his said brother utterly refused the proposed offer of said Medberry to occupy a room in the basement of the said saw mill built by them as aforesaid, showing that it would be unhealthy for him to do so, and that it would be very inconvenient for him and destructive to his tools and machinery, and unsuited to the work he was accustomed to perform in his said shop, and so in the belief of this defendant it would have been.

Nineteenth. To the nineteenth interrogatory he says, that since the destruction of said shop, as stated in the answer to said eigh-

teenth interrogatory, his said deaf and dumb brother has had
401 but very little employment of any kind, his means of livelihood having been taken away by reason thereof. He has occasionally had some small jobs to do by hand and manual labor. For a time he had some room in a furnace building belonging to defendant, not otherwise engaged, where he stored most of his tools, lathes, &c., and did some work there in the basement, but it being damp and unhealthy, and otherwise unsuitable to him, he did not continue there long; that said furnace, and other buildings in connexion with it, being afterwards burned, taking fire from the burning of the large barn and shed on the premises when sold to said Medberry and Aldrich. Most of said tools and lathes were destroyed by said fire, after which his said brother had no regular employment, and in consequence of the destruction of said shop, he was for over eight years thereafter almost entirely dependent upon this defendant for his support.

Twentieth. To the twentieth interrogatory he says, that after leaving Watervliet, on the thirteenth day of April, A. D. eighteen hundred and fifty-six, this defendant again, and for the first time thereafter, saw said Aldrich and said Medberry; the said Aldrich at Chicago, on the thirtieth day of September of that year, and said Medberry not until sometime in the month of October of the year following, and also at Chicago.

That defendant left Palmer, Massachusetts, on the twenty-third of said September, stopped at the National Hotel in Detroit, four and three-fourths days on his way out, and arrived at said Chicago on the twenty-ninth, and on the next day saw Aldrich as aforesaid. This defendant went there for the purpose of getting his pay of them of money then due him upon their bond and mortgage for the purchase of said Watervliet property, and other money they owed him, and to look after the taxes on said property.

Twenty-first. To the twenty-first interrogatory he says, that said James F. Aldrich (of Medbury & Aldrich) once, and only once delivered to him, this defendant, a policy of insurance on any
402 buildings in said Watervliet, and that was the said Jackson County Mutual Insurance Company's policy, No. 10,657, purporting to be for six thousand dollars, on their saw mill, which was the said double saw mill, grist mill, and store, and the place of said delivery to defendant of said policy was in the Mattison House, Chicago, and the time of such delivery the fourteenth day of April, eighteen hundred and fifty-five, and is the same policy set forth and described in the answer of this defendant to the sixteenth interrogatory. He positively knows, and therefore states, that the said James F. Aldrich never delivered to him any other policy or policies of insurance than the one just stated of the Jackson County Mutual Fire Insurance Company, on any building or buildings whatever at Watervliet, either at Chicago or anywhere else.

Twenty-second. To the twenty-second interrogatory he says, that he never received from said Medbury & Aldrich, or either of them, any policy or policies of insurance upon said new saw mill, to the amount of six thousand dollars, or any other amount that he has any knowledge or remembrance of whatever.

Twenty-third. To the twenty-third interrogatory he says, that neither said Medbury & Aldrich, nor either of them, ever delivered to this defendant any policy or policies of insurance upon said new saw mill, separate and distinct from the general policy or policies of insurance obtained upon the entire insurable property sold them, as provided for in the said Medbury & Aldrich's mortgage on said premises, which this defendant sold to them, to the best of his knowledge or remembrance.

Twenty-fourth. To the twenty-fourth interrogatory he says, that in the month of July, eighteen hundred and fifty-six, said Medbury did send by mail to defendant, at Palmer, Massachusetts, some policies of insurance, purporting to be on some of the buildings on said property at Watervliet, which were received by defendant on or about the fifteenth day of said July.

403 Twenty-fifth. To the twenty-fifth interrogatory he says, that all the said policies are hereto annexed, so far as he has any recollection or knowledge of them, viz:

1st. The said Jackson County Mutual Fire Insurance Company policy, No. 10,657, on the double saw mill, grist mill, and store, left with said Medbury by defendant on or about April 5, eighteen hundred and fifty-six, to be forwarded to Jackson for consent to the addition of said new mill to be added or adjoined to said double saw mill on said property, which was afterwards forwarded with the other policies, which they then promised to obta n on the buildings, as provided in their said mortgage, and forwarded without delay, which policy is annexed, marked "exhibit E."

2nd. Western Insurance Company's policy for $300 on boarding house, dated April 12th, 1856, which policy is hereto annexed, marked "exhibit F."

3rd. The Washington Union Insurance Co., policy No. 30,004, which policy is hereto annexed, marked "exhibit G."

4th. The Washington Union Insurance Co., policy No. 30,008, which policy is hereto annexed, marked "exhibit H."

5th. The Washington Union Insurance Co. policy, No. 30,009, which policy is hereto annexed, marked "exhibit I."

6th. Ætna Insurance Co., Hartford, Connecticut, policy No. 369, which policy is hereto annexed, marked "exhibit J."

7th. Ætna Insurance Company, Hartford, Connecticut, policy No. 370, which policy is hereto annexed, marked "exhibit K."

These policies are all the policies that this defendant ever did, at any time or place, or in any manner receive, from said Medbery & Aldrich, or either of them, that he has any account, recollection, or knowledge of whatever. The said Jackson policy being the same, as before stated in his answer to the nineteenth interrogatory, as being at first received from said Aldrich, on the exchange and delivery of the papers at Chicago, on April 14th, 1855.

Twenty-sixth. To the twenty-sixth interrogatory he says, that after the reception of said policies of insurance, mentioned in his answer to the twenty-fifth interrogatory, this defendant never

404 again, at any time or place, received any policy or policies of insurance from said Medberry or Aldrich, or either of them.

Twenty-seventh. To the twenty-seventh interrogatory he says, that from the 13th day of April, A. D. 1857, to the 30th day of May, of that year, this defendant had but the two annexed Ætna policies of insurance, amounting to thirteen hundred dollars, and that from and after said 30th of May, he had no insurance at all upon said property, which was procured by said Medberry & Aldrich, or either of them, except said Jackson County Mutual Fire Insurance policy, said "exhibit E," upon which policy this defendant never felt any reliance or security, for the reason that whenever he wrote or called upon said company (which was several times) to know whether that policy was good and valid, he never at any time obtained a favorable answer that it was good for anything, which policy he has since ascertained was then void; that after said thirtieth (30) day of May, A. D. 1857, this defendant, having no other insurance upon said property, or any part thereof, except said Jackson county policy "exhibit E," in which he had no confidence, did, on or about the tenth day of October, A. D. 1857, procure some policies of insurance on said premises.

Twenty-eighth. To the twenty-eighth interrogatory he says, that the reason why this defendant came to apply for policies of insurance upon said premises, was on account of his having been for some time without insurance upon said premises, and on account of the neglect and final refusal of said Medberry & Aldrich to furnish him any policies of insurance, although they had before frequently promised to do so. Prior to this time this defendant had repeatedly written to them, requesting them to furnish such insurance, and they neglected to do so; and on or about the first of October, A. D. 1857, at an interview between both said Medberry & Aldrich and this defendant, at Chicago, this defendant demanded and insisted upon their compliance in this behalf, as well as to do other things they
405 were required to do, and which they had agreed to do, but did not do, and then wholly refused to obtain further insurance, stating to this defendant that they could not afford, &c.

This defendant says he is positive that he never, at any time, requested the privilege, from either said Medberry or Aldrich, of obtaining any policies of insurance, for the reason that he was under no necessity of doing so, as he already had that privilege by the terms of their mortgage on said premises, dated April fourteenth, A. D. 1855, and for the further reason that he did not want to advance the money for them which he would, in that case, be under necessity of doing. The applications and policies were obtained by the authority and terms of said mortgage, executed by them on said premises to this defendant, bearing date April 14th, 1855, as before stated, and wholly and entirely upon the motion of this defendant, and not by any consent, request, or privilege, granted by said Medberry & Aldrich, or either of them, at any time, except what is contained in said mortgage. The applications were made and the policies obtained wholly and entirely without the knowledge or consent of said Medberry or Aldrich, so far as this defendant knows or believes,

and wholly and entirely for the purpose of this defendant's self protection, immediately after, or within a few days after the refusal, by said Medberry & Aldrich, to pay this defendant any part or portion of a large amount then due this defendant from said Medberry & Aldrich, or to obtain and assign to him any more insurance, and at a time when a large amount of said lands were being sold for taxes, and large amounts of the most valuable timber were being stripped from said premises; and the obtaining of said policies was preparatory and in view of his commencing legal proceedings to foreclose said mortgage, and on application for an injunction to stay waste upon said premises, all of which this defendant did about the same time. To all which he was then more particularly actuated and prompted to do, not only on account of their constant failures to per-
406 form and meet their promises and agreements with this defendant, but at this time, to wit, the first part of October, A. D. 1857, this defendant ascertained that said Medbury & Aldrich were very much embarrassed in their business, and harrassed with law suits, as appeared by the published reports of courts of record in the newspapers of Chicago, in which reports said Medbury & Aldrich were, one or both of them, defendants in some twelve cases of courts of record of Chicago alone, besides other cases elsewhere, of which defendant heard and believed.

That the applications for said policies were made to R. C. Paine, an insurance agent at Niles, Michigan, at which time this defendant was informed by said Paine that he thought, but did not know certainly, that there was other insurance then exhisting upon said premises. Paine stated to defendant that one Emory M. Plimpton, another insurance agent at Niles, had done insurance business with said Medberry & Aldrich, and would be likely to know whether or not there was any other insurance upon said premises; whereupon this defendant immediately went to said Plimpton, and was by him informed that there was an insurance upon said premises in the Washington Union Insurance Company for said three thousand dollars. This was the first time, in any way or manner, defendant was informed of the existence of said insurance, of which notice was given by this defendant, as required, to said Paine; and these were the ways and the only reasons why this defendant came to name the amount of the policy or policies issued upon the property in this defendant's application for insurance.

This defendant paid, in the first instance, the premiums for said policies of insurance effected with said Paine, then amounting, with the agents charges, to the sum of two hundred and thirty-six dollars and fifty cents, no part or portion of which did said Medberry & Aldrich, or either of them, pay, and the same has never been repaid to this defendant by them, or either of them, but this defendant was repaid for the same by one Joseph Carr and one William Aldrich, in an accounting with them at said Niles, on the twenty-seventh of November, A. D. 1858, who stated that they had purchased the interest of said Medberry & Aldrich in said premises, and when they were paying up to this defendant what was then due on a decree he had

407 obtained against said Medbury & Aldrich, and in order to prevent a chancery sale of said premises, which ~~at~~ had been advertised to take place on that day, (November twenty-seventh, A. D. 1858.) He further says, that when he first made application for such insurance, in the name of said Medberry & Aldrich, he found much difficulty in doing so, owing, as was stated to him by insurance agents, to the manner in which said Medberry & Aldrich did their insurance and other business; that said Plimpton stated to him then, and also subsequently thereto, that he trusted them for premiums which they never paid, and it was partly on that account, as well as on account of finding that they had previously taken some policies on said premises, that had not been assigned to this defendant, effected so little insurance on said premises at that time; and when those policies that he did then obtain were about to expire, and he sought to have them renewed, he met the same difficulty as before. See "Exhibit N." Hence the reason and necessity of this defendant's procuring policies of insurance on said premises in New York city, where he then was, and which he did on or about the twenty-seventh of September, 1858, to the amount of $6,000. At the same time, in making the application, giving at random notice of other insurance that might be upon said premises, not knowing how much it might be, or where, or at least only about $3,000, that he then knew of, that he effected as aforesaid on the premises, at Niles, October 10th, A. D. 1857, which would then expire October 10th, A. D. 1858. The amount of premiums this defendant paid in the year 1858, on the $6,000 effected in New York city, on or about September twenty-seventh, was two hundred and ten dollars, which was never repaid him by said Medberry & Aldrich, or either of them, was paid him on said accounting at Niles, on November twenty-seventh, A. D. 1858, by said Carr and William Aldrich, at which time said Joseph Carr and William Aldrich, paid to this defendant, on said Medberry & Aldrich bond and mortgage, which was then endorsed on said bond, the sum of fourteen thousand six hundred dollars and forty-three cents, which, as then reckoned, reduced the claim on
408 said bond and mortgage, and the other collateral security, to twenty thousand dollars; and at the same time said Carr and William Aldrich proposed to, and did go on building a new grist mill in place of the one that was burned; after which, for some time, this defendant had more confidence in the prospect of getting his pay for the balance then due, and hence felt less anxiety about the insurance question, and did not press the same as hard as he had done before, though he still requested said Carr to insure and assign the policies to this defendant, but it never was done; and this defendant did not thereafter obtain any policies on said premises till after the same were sold and bid off to this defendant and others, on the fifteenth of April, A. D. eighteen hundred and sixty-three.

Twenty-ninth. To the twenty-ninth interrogatory he says, that at the time he made his first application for insurance—October 10th, 1857—he did not, as before stated, hold any insurance upon said property, except the said worthless (as he then supposed, and has

since ascertained positively, that the same was invalid and void at that time) Jackson policy, No. 10,657. The largest amount of insurance which this defendant had at any one time, which was in July, 1856, upon the said premises, during the time they were owned by said Medberry & Aldrich, was, with and including said Jackson policy, nine thousand eight hundred and fifty dollars; and without and not including said Jackson policy, it was three thousand eight hundred and fifty dollars, which was assigned to them by said Medbury and Aldrich and J. S. Stewart; and this witness obtained, October 10th, 1857, of R. C. Paine, as aforesaid, $7,000 00, which was the largest amount he now recollects or has any account of. The value of the insurable property on said premises at the time this defendant made his said first application for insurance, (October 10th, 1857,) as usually estimated for insurance purposes, was, in his opinion, between forty-five thousand and forty-six thousand dollars. He estimated the whole value of such portion of said insurable property, as follows, viz :

1	grist mill, 40x60 ft., 2½ stories, burned Sept., 1858, ($1,000 insurance,) at	$7,000
1	double saw mill, 40x110 ft., 1 story above basement, at	10,000
409	1 new saw mill, 60x60 ft., 1 story above basement, at	15,000
	1 new store, 22x70 feet, 2 stories high, at	3,000
1	old store, about 24x36 feet, 1½ stories high, at	500
1	hotel, about 34x44 feet, 3 stories high, at	6,000
1	boarding house, about 24x60 feet, 1½ stories high, at	1,000
1	boarding house, about 22x28 feet, 2 stories high, at	600
1	dwelling house, about 24x44 feet, 1½ stories high, at	1,000
1	dwelling house, about 18x34 feet, 1½ stories high, at	500
1	dwelling house, about 18x24 feet, 1½ stories high, at	200
1	barn, about 36x50 feet, 2 stories high, burned about 1860, no insurance, at	600
1	barn shed, about 24x80 feet, 1 stories high, burned about 1860, no insurance, at	200
	Total amount	$45,600

The defendant believes and is quite positive that he never had, at any time, insurance upon said property to an amount equal to one-third of the value of the insurable property upon said premises sold by him to said Medbury and Aldrich at Watervliet.

Thirtieth. To the thirtieth interrogatory he says, that the size of the saw mill that was built by said Medbury and Aldrich, at Watervliet, was sixty feet by sixty feet on its foundation, and the basement was sixty feet square also; but the upper part was built over on to said double saw mill eighteen feet, which made the upper part sixty feet by seventy-eight feet in size. Said saw mill, as built, was never accepted by this defendant as a compliance with said contract of Medbury and Aldrich, or of the provisions expressed in the agreement endorsed upon the mortgage on one-third of the Empire flour-

ing mill and lots in Milwaukee, upon which this suit is brought. This defendant was at Watervliet most of the time during the spring of eighteen hundred and fifty-six, up to the thirteenth day of April of that year, and not at all in said spring after that date, and that during that portion of said spring that he was there he has no recollection of being present at said saw mill with John W. Medbury, J. S. Stewart, and Henry F. Miller.

He states most emphatically and positively that he never
410 did at any time, in the spring or summer of the year eighteen hundred and fifty-six, or at any other time after the completion of said saw mill, go through, and never went through said saw mill with said parties above named, and was shown the same and the change in the original plan; and the reasons of said change were never explained at any such time by any such parties to this defendant, and at no such time, that he has any recollection or knowledge of, was this defendant asked if he was satisfied with said change, and at no time or place did this defendant ever declare himself satisfied with the change, and he never accepted the same as a compliance with said contract of said Medbury and Aldrich, or the provisions expressed in the agreement endorsed upon the said mortgage in said suit.

Thirty-first. To the thirty-first interrogatory he says, as to the statements in said interrogatory purporting to be an answer of Jonathan S. Stewart to an interrogatory propounded to him, and recited in said thirty-first interrogatory, this defendant says that such statements, whether made by Jonathan S. Stewart, or any other person or persons whatsoever, are gross mistakes, and wholly, entirely, and altogether untrue, and that no such interview, examination, or conversation, as therein stated, ever occurred or transpired, at any time or any place whatever, and most especially could not possibly have occurred or transpired as therein stated, with this defendant present in said saw mill, and in the forepart or any part of the month of May, eighteen hundred and fifty-six, and when the mill was completed, or very nearly completed, for the reason that said defendant was not in, at, or near said saw mill; was not in the township of Watervliet where said saw mill was then and is now located; nor was he even in any part or portion of the State of Michigan, at any time or during any part or portion of the last half of said month of April, the whole of the month of May, June, July, and August in the year eighteen hundred and fifty-six; and for the further reason that when said defendant last saw said saw mill in the year eighteen hundred and fifty-six, (and then only in a casual way, which was in the forepart of April in that year, after which he never saw said saw mill until the month of October, A. D. eighteen hundred and fifty-seven,) said saw mill
411 was not then completed, nor very nearly completed; neither, to his knowledge, was the machinery and gearing in the mill at that time. It was not then within nearly or quite two months' time, of extraordinary effort and labor, of being made ready to run, (see the letter of Medbury & Aldrich of May 19th, 1856, hereto annexed, marked "exhibit P;" and there was then (the forepart of April,

1856) no such dimensions to the mill as intimated in said statement, viz: seventy-eight feet by one hundred feet. Said saw mill building *building* was then, as this defendant has since ascertained by careful measurement, just sixty feet square; and, as heretofore stated in this testimony, the upper part of said mill was extended over eighteen feet on to another saw mill which they did not build. There was no outside platform then built that he saw, with which (if that be a part of the mill proper) to estimate such very large dimensions, nor was any such platform then known to defendant as in contemplation to be built; therefore, no such inspection and examination of the machinery, gearing, platform, &c., as therein stated, could possibly have occurred at any time when this defendant was at Watervliet, and at or in the saw mill, in the year eighteen hundred and fifty-six. And in orderto explain more fully and particularly the reasons why such statements as those made as aforesaid by said witness, Stewart, or any similar ones that may be made by other persons, are erroneous and untrue, this defendant refers to his detailed answer to the eighteenth interrogatory heretofore given, in which he states where he was at such times. This defendant states that he is enabled to give these positive statements not only from his recollections, but from dates and data noted at the time and times referred to in writing.

Thirty-second. To the thirty-second interrogatory he says, that he has been engaged in the business of planning and estimating the cost of buildings, using and operating saw mills, and other kinds of water mills, for more than twenty years. He has built, and assisted in building and reconstructing particularly, four saw mills, two
412 grist mills and flouring mills, all driven by water, and various other mill-wright work. For about seven years that kind of work was his principal business more than any other one thing; and he has also been engaged in the business of civil engineering, laying out, levelling, and estimating water powers, &c., to a considerable extent—cannot now say how many; but he believes he has laid out more than twenty water-mill sites. He does not wish to be understood as having made this department of business his entire and special occupation and means of livelihood, as he has had most of the time time other business on hand to do and to see to.

Thirty-third. To the thirty-third interrogatory he says, that he first saw said saw mill after it was completed, or so far as it ever was completed, as built by said Medbury and Aldrich, so as to know it in all its details, or to any extent, by his own inspection and examination, after it was put in running order, about the middle of October, A. D. eighteen hundred and fifty-seven.

The first requisite for any large structure or building is a good foundation; more especially is that the case with any large mill in which is to be run a large amount of heavy machinery, with reciprocating actions and irregular motions like mills and upright saws; and most especially is that the case where such mill is so placed in, surrounded, and propelled by water. And to create the power of water sufficient to drive successfully such machinery in such a mill, there must be a bulkhead to hold up or hold back for use the water to

propel the machinery, and that bulkhead must be strong and secure to insure success; and without these two initial requisites no water mill, in this defendant's opinion, however great the capacity otherwise, however proper its construction otherwise, or however good the machinery may be that is put into it, can be a first class mill. The said saw mill that Medbury and Aldrich built at Watervliet was a water mill, without either a good foundation or a good,
413 safe, and secure bulkhead, and in, therefore, in this defendant's opinion, said saw mill was not a good, first-class mill, and had not the the first elements of success about it as such. The character of the machinery, or most of it, that was put into said mill, was, in this defendant's opinion, generally good of its kind—that is, as to quality and workmanship.

Thirty-fourth. To the thirty-fourth interrogatory he says, that said saw mill, built by said Medberry and Aldrich, was not as valuable, in this defendant's opinion, as a saw mill fifty feet by one hundred and fifty feet in size, properly built according to the plans agreed upon between said Medberry and Aldrich and this defendant, for the following reasons: 1st. A saw mill fifty feet by one hundred and fifty feet in size, properly built, would have a good, firm, and substantial foundation, and a good, safe, and secure bulkhead, whereby to control the head and pressure of the water so it would not give way, to hinder the use and working of the mill, and allow the water in its escape to rush under the same, undermine, impair, and perhaps destroy the foundation of the mill, or at least so cause it to settle that the machinery would not work well in it, as was the case with the saw mill that said Medbury and Aldrich built at Watervliet. 2d. A saw mill fifty feet by one hundred and fifty feet in size, properly built, would have a greater area and more superficial room enclosed, and covered to work in, secure from the inclemencies of the weather, than the one they built sixty feet by sixty feet in size, or even sixty feet by seventy-eight feet, its greatest extent above, built on, as it was, to another mill. 3d. It would have room inside closed up for storing the night run of sawing, as it is important and usual to run such water mills night and day, where lights could be used without having to run out doors with the lumber, and unload and deposit the same, sometimes in storms, cold, and wind, where lights could not at all
414 times be so well used as indoors, which advantage the mill which said Medbury and Aldrich built at Watervliet has not, as there is room to store but very little of anything within said mill.

4th. There would be more and better room for longer and better gangways, and saw carriages, and railway tracks, leading from one gangway and saw carriage to another, or from one gang of saws to another, on its easy and proper way through and out of the mill into the lumber yard when all completed, and assorted within the mill for piling kinds and qualities together, which latter could all be done by day-light, if there was room within the mill to deposit the night sawing without having to run back any of it from the outside to be edged and fitted, and which could all be done together with the day sawing by day light, that is, edged, assorted, run out, and piled or

"stuck up" kinds and qualities by themselves, in the lumber yard, or piling ground, for rafting away or boating for market, at any proper and suitable time for doing so.

5th. The mill, if properly built fifty-feet by one hundred and fifty feet in size, with two large breast wheels sufficient to produce all the required power, and geared or belted to all the various machinery, would have left a far greater proportion of dry and unincumbered room below for lath and picket sawing, planing machines, &c., &c., while the mill built by Medberry and Aldrich had numerous small water wheels, spouts, &c., placed nearly all over the basement, spouting, jetting, and spraying water pretty much all over it, which almost entirely destroyed the use and value of their basement, for any such purposes. In fact, this defendant is not aware that they ever attempted so to use their basement room, and at best it is and always must have been a very damp unhealthy and unpleasant place for men to work in.

The new saw mill which said Medberry and Aldrich built at Watervliet, was operated altogether on a different principle or application of the water to obtain the requisite power, from the one that was contemplated and agreed to be built fifty by one hundred and fifty feet in size by them. The one they built was not a geared mill, and therefore the water in most cases was carried by
415 flumes, trunks or spouts, to single or combined wheels, acting together and quickly, generally directly under the work it had to do, consequently requiring perhaps a little greater breadth to escape the water, so as not to interfere with each other, and especially those below (that is down stream) interfering with those above (or up stream,) in their different discharges. This principal for small and common saw mills, with but little and compact machinery, is simple, cheaper, and generally preferable for such to geared saw mills, especially on high heads of water, but not so in this defendants opinion for large first-class mills for merchant work, or for making lumber under one roof on a large scale, say with three gangs, that they will each cut through from logs, from ten to twenty thousand feet of lumber per day, or day and night, and also a large circular saw for all kinds of stuff, and especially for very long stuff of sixty to seventy feet in length, as some sawing then at Watervliet required, in working up profitably the large proportion of the sap pines that prevailed there into timber, in which timber was its great value, while such a circular saw of six feet in diameter well driven, would cut from thirty to forty thousand feet in twenty-four hours, such a saw and its carriage would require a mill at least one hundred and fifty feet in length, and such a mill, with the gangs and large circular saw, would cut through and through, and leave and produce a large amount of stuff that would have to be trimmed, edged and cut off and slit through to separate the clear and good from the common and cull stuff, to make it suitable and advantageous to take to the great lumber marts, and pass inspection properly; while for the latter work it would require a large amount of other and lighter machinery in different parts of the mill, but so situated as to be easy of

access, or to reach and take away from the same; hence, with length
to the mill, and these fitting and completing machines, located
416 on the proper railways through it on which to carry and move
to and from them the lumber in its manufacturing process, at the same time assorting and putting together like kinds and qualities, which are all the time accumulating and piling up on the cars on the railway tracks, and then when a load is completed, directly in its way out to the place or places of piling or discharging said cars, is far better than width without length, requiring as such mills do, immense and severe manual labor to handle and move sideways to the finishing machines, and then back again on to cars, in order to run out and discharge, &c.; but with the use of small wheels, each to do a particular kind of work, breadth is indispensable in order that each little active water wheel may have a line of discharge and escape of its vast water, without interfering with others of like kind running at the same time; some of the wheels they did use are placed below others, which should not have been the case if it could possibly have been avoided, and greatly retards the action of other wheels.

Nolso for a saw mill of such capacity, with one line of large and powerful water wheels running directly across it, as was contemplated and agreed to be built, and actually begun by driving piles for its foundation, in the fall of eighteen hundred and fifty-four, by said Medberry and Aldrich, with the water flowing easily upon them, and discharging from them without jets, spirts or sprays below, and so there would be no agitation of the water from one to disturb or affect the other, as each would have a free, clear, and open line of discharge below; and from such large and sufficiently powerful water wheels, said power was to have been directly applied and carried to a main or driving shaft, and then from that shaft taken by other shafts or gearing, or by belts and pulleys, to any location of machinery required in any part of the mill; thus doing away with all the interfering and cheap little water wheels that they used, saving water and gaining all the power of weight or gravity on the leverage that there possibly could be with that head of eight feet, and all the water that could be then commanded at ordinary and usual stages of the
same; thus leaving no stumps or steps for vertical shafts of
417 horizontal water wheels to grind or wear down, exposed to
the sand or sediment of the water so agitated by the little wheels and by the floods carrying along the hard sharp sands common in the Paw Paw river, on which said saw mill is situated, and placed as are those built by said Medberry and Aldrich, so low that in times of high water it is almost impossible to get at them to repair, if they happen, as is more usually the case, to give out at such times, or to put in new ones, until the time for low water arrives, whereby much valuable time is often wasted by such delays. This defendant positively asserts, that he has had there in certain seasons of high water, entirely new steps, like some of those said Medberry and Aldrich had put into the said saw mill they built there, wear down so as to be incapable of longer use in less than forty-eight hours time.

Hence, from such like experiences, and other reasons too numerous to mention here, in addition to those already spoken of and explained, this defendant says, that in his opinion, the ~~burst~~ or pitch-back water wheels, were better suited for, and were intended to drive all the machinery of said saw mill, with such all the journals and bearings in whatever place in and about said mill would have been at all times, up and out of the water and dry, of easy access at all times to lubricate or repair; in short, all the arrangements (except the motive power and what is connected with it) were to be precisely like the best class of steam saw mills of like capacity, the best of all saw mills, except in the expense of running, while said large breast water wheels would act the part of fly wheels, which is all important where the resistance is irregular or by jerks, as it is in saw mills, and by the inertia of uniform rectilinear motion when moving.

The advantages of cone-feed works, and of slip pulleys on geared machinery, for such a saw mill, where a mere child can regulate the motion of the most powerful machinery while running, which never has and never can, to this defendant's knowledge, be practically and successfully used in an ungeared saw mill, are of very great importance and sufficient in his opinion, to pay well the difference in expense of their introduction and use.

418 Thirty-fifth. To the thirty-fifth interrogatory he says, that he is positive and sure that it was entirely practicable to have built upon the stream on which said saw mill is situated, a saw mill fifty feet by one hundred and fifty feet in size, upon the foundation as commenced by driving piles, by Medberry and Aldrich, in the fall of eighteen hundred and fifty-four; and, according to his opinion, such a saw mill, of the size of fifty feet wide and one hundred and fifty feet long, up and down the stream, properly built as planned and agreed to be built by them, and as it was commenced by driving piles therefor in the fall of 1854, by them, and properly placed upon said foundation, would have been of far greater value, and better adapted to the purpose of making or manufacturing marketable lumber out of saw logs, than the saw mill that was built by said Medberry and Aldrich; and would, in this defendant's opinion, have been worth at least as much as two such mills as they did build, for reasons fully set forth in his answer to the thirty-fourth interrogatory, to which he refers for further answer thereto.

Thirty-sixth. To the thirty-sixth interrogatory he says, that, in his opinion, the saw mill then built at Watervliet, by said Medberry and Aldrich, was never well and properly built, and completed in a workmanlike manner, for the reasons—

1st. On account of its defective foundation.

2d. On account of its poor and imperfect bulkhead or front sheet piling, which gave way, and caused the said saw mill, with its poor foundation to settle and throw the machinery out of line and place, and it has always since been settling and thereby increasing the same difficulty.

3rd. The breast, or by some called the bulkhead, that the trunk

or spout was taken out of, to drive the jack and edgers, was never by them substantially and securely built and constructed, and has caused much trouble and damage.

4th. The basement never was, to this defendant's knowledge, finished or even enclosed.

5th. There was a good deal of sappling-pine timber
419 used in the frame work and for supporting the machinery where great strength, endurance, and duribility are requsite, where, in this defendant's opinion, the best of white-oak timber (of which there was an abundance in the neighborhood) should have been used, which yielded, gave way, and prematurely decayed.

6th. The upper part of the mill, sixty feet by seventy-eight feet, was handsomely clapboarded, at least on the east and south sides, roofed and corniced, but never painted, which is an ommission not common for buildings of that size, kind, and exterior finish, to be considered as completed, and especially while standing in connection and joined on to the double saw mill that was well painted.

7th. Such a saw mill as was built there, having three gangs of saws abreast, should have had, as is usual in saw mills on that plan and construction, a crane, or machine propelled by water, for raising great weights and moving them to a distance; for moving cants and heavy pieces of timber from one gang to one or the other gangs, as it is often required in order to finish it, instead of moving it over on rollers as the practice in said mill has been.

8th. If by any mean the platform is to be called the mill, or a part of said saw mill, in estimating its size, then that was never completed as a part of the mill building, being only a mere frame work, never boarded or roofed, with but a few rough plank laid down upon it to walk on, and sometimes to pile slabs and lumber upon.

And lastly, though not the least, in his opinion, said saw mill, built by said Medburry and Aldrich, was not well and properly built and completed in a workmanlike manner, for other reasons stated in his answer to the thirty-fourth interrogatory, to which he refers for further answer hereto.

Thirty-seventh. To the thirty-seventh interrogatory he says, that he has fully answered this interrogatory in his answer to the thirty-fourth interrogatory, and he refers them for his further answer thereto.

Thirty-eighth. To the thirty-eighth interrogatory he says,
420 that, in his opinion, the capacity for manufacturing lumber of a mill properly built, on the premises at Watervleit, upon the foundation commenced by driving piles in the fall of 1854, of the size and plan agreed to be built by said Medberry and Aldrich, would have been from seventy-five thousand to one hundred thousand feet of lumber in a run of twenty-four hours; while the mill that was built by them, and now thoroughly repaired, so far as it can be done on account of settling of the mill, has not cut, so far as he is aware, or has been informed, over thirty thousand feet, and generally not over twenty or twenty-four thousand feet, in a run of twenty-four hours, since it has been so repaired.

Thirty-ninth. To the thirty-ninth interrogatory he says, that in his opinion, founded in a great measure from experience in such matters, and from what he can recollect of the estimates, bids, and proposals which he has received while contemplating building said mill himself, which he has not now on hand to refer to, as he is quite sure he gave them to said Medberry at the time of the sale or soon after, the cost of said mill, fifty by one hundred and fifty feet in size, as then planned by him, and agreed to be built by said Medbery and Aldrich, with good pile foundation, and all built two full stories high, with strong frame, well enclosed, roofed, and painted, having two breast wheels, each twenty feet long, and twelve (12) feet in diameter, with all the necessary gearing, strapping, belts, and pulleys, with three gangs of saws, and one six foot circular saw for sawing lumber, two edging saws and tables, two setts of lath and picket saws and tables, two cut-off saws and tables, one jack work for drawing logs into the mill, and all the other necessary equipments, tools, fixtures, &c., &c., complete, with the work all well superintended, and all the workmen well and faithfully paid in cash every Saturday night, and all bills at cash prices promptly paid, would then have amounted to about twenty-five thousand dollars; while the comparative cost of that, and the one that was built at the same place by the said Medberry and Aldrich, would be about as follows:

421 First. The foundations of the latter, thirty six hundred square feet, would not be quite one-half that of the former, (seventy-five hundred square feet,) the proportion is as twelve to twenty-five. The main bulk-head, to stop the water going under the mill, of the latter, (sixty feet,) other things being equal, would be one-sixth more than the former, being only fifty-~~two~~ feet wide. The timbers, flooring, siding, roofing, other materials, and labor, would be about in the same proportion of the foundations. The larger water wheels intended for the former would have cost more than double what the latter should, or probably did, unless there was some patent right to pay for. The three gangs in each, and jack works would have been about alike, while the lath saws, edgers, and cut-off, would have been more than double. (As this defendant does not know of more than one edger being in said saw mill, and believes there were no lath works in said mill, but the same were in the basement of the old double mill, and the cut-off that was in said new mill was taken from said double saw mill, so they did not built it nor the lath works, as he is informed and believes.) The six feet circular saw carriage, and machinery with it, would have been extra in the former, and would then have cost about one thousand dollars, completed and put up. The shafting, gearing, belting, &c., full six times in the former that of the latter, and the larger amount of work which the larger mill would do, would of course require a proportionately larger amount of tracks, trucks, and cars, and other appointments. The mill that Medberry and Aldrich built at Watervleit, ought not to have cost, as times were then, over seventeen or eighteen thousand dollars, at the utmost, but it may have figured up

more than that by want of proper attention, &c. The saw mill, fifty feet by one hundred and fifty feet in size, properly built there, would, in this defendent's opinion, would have been more than double the one that said Medberry and Aldrich did build there, even if it had equally as good a foundation, while, with the poor foundation which said saw mill built by said Medberry and Aldrich, had, it is difficult to say what the relative difference in real value would
422 be, and therefore he *he* cannot state. The former mill would, in his opinion, have had more than twice the power and capacity, and would have done at least twice the amount of work in a given time, with a less proportion of hands to attend or work it, and with only about an equal amount of superintendence.

Fortieth. To the fortieth interrogatory he says, that below said saw mill built by said Medberry and Aldrich, at Watervliet, and adjoining to and no higher than the basement part of said mill was a structure erected in a rough manner, which is known, and commonly known, as "the platform." The size of it he never measured, but thinks it somewhere about forty feet by seventy-eight feet, the largest way north and south. It has never, within the knowledge or belief of this defendant, been enclosed in with the said mill, or by itself, with boards or anything else, and has had no roof to it, nor machinery in it. It is a mere frame work, made of about medium sized pine timber and planks roughly laid down upon it; and upon one part of this platform stands another temporary structure, eighteen feet wide and twenty-eight feet long, its frame work of the balloon order, so called; that is, made of light scantlings, with quite a poor roof over it, just high enough to clear the head, put there to cover a part of an edging table, which, this defendant believes, is partly in the said mill and partly in said structure on said platform, but of this he is not quite certain. Said platform is not the mill, or any part of the said saw mill, but it might be called an appendage to it, or a convenience sometimes, to get the lumber out of the mill upon, on account of the mill being so small, and no room for it there to pile, assort, or raft it. So are log-ways, and slides, and railway tracks, &c., convenient fixtures, sometimes extending into, and sometimes out of, saw mills to a great extent. All saw mills, properly built, have more or less such outside fixtures, according to circumstances. Said platform is nothing more than a common, and
423 not by any means an uncommon fixture, appurtenance, or appendage to the outside of saw mills. It contains no machinery, and there is a whole saw mill without it. In this defendant's opinion the building containing the machinery is the saw mill, and that mill which they built at Watervliet is just sixty feet square on its foundation and basement, or first story, where the main and principal part of the machinery is situated.

And for the purposes of piling or rafting said platform can be of very little use, in this defendant's opinion, and the reasons for said opinion are:

First. It would hold only about one day and one night's sawing; therefore to make it of practical use for anything more than simply

for the lumber that can be piled on it at once, all the lumber should be rafted away from there every day, and that would be very inconvenient there, where the water is so much agitated so near the water wheels, and that cannot be done usually more than about one-fourth part of the year. November, December, January, February, and March are five wintry and inclement months. Sometimes lumber may be safely run and got to market the first half of November, but a prudent man would not make his calculations to risk it. Through March, generally, and sometimes into April, are the floods of the breaking up of winter, when the river banks are overflowed into the swamps and bayous, which are common on the Paw Paw. At such times it is not only difficult, but too much lumber is likely to be lost and wasted to make it an object to raft during the month of March. April and May are generally the best months for rafting of the whole year; sometimes the water gets too low the latter part of May. During the months of June, July, August, and September the river is generally too low to raft to advantage. After the equinox, and through the month of October, rafting is again usually done with success.

Thus, only about one-quarter of the year could said plat-
424 form be used for rafting purposes; and, without rafting it there, it is a poor place and very inconvenient and laborious to take lumber away from the railway track which crosses on and near the north end of said platform, to sort and then get it back to the cars or trucks on the track, and then take it away to the piling ground, which would be necessary when it could not be rafted there.

Second. Said platform, in the place and shape it is, is not the place to assort lumber. Lumber, in his opinion, should all be assorted when it leaves the last saw to which it is applied, and where it is completed and fitted for market, and then put directly upon the car containing its own kind or quality, and which should be standing upon the proper track waiting for that purpose, and, when loaded, run directly away to the piling ground for rafting or shipping at the proper time.

Third. Said platform is of but little account for piling lumber upon, on account of the room thereon being only capable of holding or sustaining about one day's sawing; besides, there is an abundance of room for either assorting, (after leaving the mill,) piling or rafting lumber, as there are more than one hundred rods in length, and any width desired, accessible by rail track, or tracks that may be laid on the banks of the same mill race and the river itself, that is used or may be used for that purpose, of exceedingly good ground, which was, when said mill was built already prepared for that purpose. The track for the old (double) saw mill, being the one with which the track from said new saw mill connects, which this defendant built before said premises were sold to said Medberry and Aldrich, runs along the same race bank that said platform is on, and at a convenient and suitable distance from the water in said race, for piling and rafting for about twenty-one rods, and then across the river on

a very substantial bridge, built on piers supported on piles some twenty rods some further on. Said railway tracks is generally from eight to ten feet above the piling ground. and has an inclination of about one foot to every hundred feet in length of down grade away from the mill, so that a man can, by hand, very easily run a car, with fifteen hundred feet of lumber on it out on said track, unload at any pile, and then take the car back on a run, if he likes; such ground for piling and rafting is abundantly ample for any two entire years' sawing ever likely to be done there, and that, too, directly on the water's edge for rafting at any time desired; that is, whenever the water in the river is at a proper stage and right condition for rafting. The present owners of said mill, who have been running the same, and shipping or rafting lumber from there for the past season, have not, to this defendant's knowledge or belief, rafted a board from said platform, nor, in fact, used it for any other purpose whatever, except that the railway track that they use runs on and over one end of it. Said platform, in this defendant's opinion, is no part of said saw mill, and almost a useless appendage to it. It is permanently fastened to it, as this defendant could discover by close examination made by him at one time, about two years since, for that purpose.

Forty-first. In answer to the forty-first interrogatory he says, that, in his opinion, a saw mill fifty feet by one hundred and fifty feet in size, built upon the same premises and stream of water as the mill that was built by Medberry and Aldrich, would have admitted of the construction of far better railway facilities for passing logs and lumber through the length of the mill, from one saw carriage to another, and thence, when manufactured into lumber, out of the mill into the lumber yard for piling or for market, than the said saw mill as erected by said Medberry and Aldrich, for the reason that the greater length of the former would admit of placing two gangs of saws by the side of the railway track, and on the same line of saw carriage and railway tracks, one after another. A saw log, when being drawn up from the water at the upper end of the mill by the log jack on a truck and track, might be taken on a railway track by the side of, and parallel with, the saw carriages, or saw gang ways, of two or more gangs placed on a line, and one after another, either to one or another on the same truck or car, without unloading it, and rolling it or moving it side ways, as is the case in the mill they built—and again—when a log has first been run through the slabbing and bolting gang, as is usual in the case, it, or the bolts or cants, which the slabbing and bolting gang have made of it, can easily be dropped off on to a car on the near and parallel track on either side, and then easily shoved along on the track still further on, to the stocks or ~~pulley~~ pony gang on the same line, if placed one after the other, where the mill has length enough to admit of it, (which a mill one hundred and fifty feet would have,) where the cants or bolts made by passing through the first gang are to be sawed into boards for market by said stock or, pony gang, and thence again dropped off on to the car standing and

waiting for it, to be still carried on and out into the piling yard, or if any of said boards are found imperfect on the passage of the car out or onward, by the side of the edgers or cut-offs, as the case might be, in order to complete it for market, such and such pieces are left by the side of them to be so completed—so that when there is length sufficient to the mill to so place the gangs, and the finishing and completing saws one after another, it greatly facilitates the movements from one to another, by leaving them on a continuous line of railway tracks. And the same principle and convenience holds good where, when the log comes up from the water and is first run through the round gang, so called, it saws all the log up into unedged stuff, then that stuff, as it leaves the round gang entirely unfit for market until edged, is dropped on to a car standing for that purpose on the track beside it, and passed right along out of the way to the edger, placed also on the same track further on, and out of the way of the round gang, and there at the edgers it is edged and slitted, if need be, to make the stuff more marketable, and any piece that happens to be imperfect, and requires cutting off, is left at the cut-off saw as it passes along, still on one side or the other of said track, and then after picking up and making out a load of what has been before left for fitting, the car passes still onward to the piling ground.

427 And the same with the great six feet circular saw, and its carriage and carriage ways, only that, for sawing long timber would require full one hundred and fifty feet in length, and could have nothing more on its own line, but would have a railway track running the whole length of its carriage way. That saw, which was intended and agreed should be put into the mill they were to build, said Medbury and Aldrich left out entirely from the mill they did build, as it could not be got in to work to any advantage in their mill, as they they built it of only sixty feet length carriage-way—and besides they put no water wheels into their mill that they then built; that would, as this defendant believes, run it successfully at all—but said breast wheels would have run it, with all the other named machinery, as this defendant believes. The saw mill that said Medbury and Aldrich built would admit of no such railway facilities. The length for its saw carriage or gangway was only sixty feet instead of one hundred and fifty feet, as it was promised and agreed to be, and as this defendant believes it should have been for the benefit of and of value to its owners. And on account of not gearing their mill, they very naturally had to place their gangs all abreast, that the water might discharge from their little wheels without interfering with each other, as this defendant has before stated, in his answer to the thirty-fourth interrogatory. Consequently, by having the three gangs abreast, or placed side by side with each other, with no possible chance to run railway tracks across their saw carriage ways or gangways, there had to be necessarily a great deal of side way moving of stuff from one gang and its ways to another gang and its ways, and from said gang ways to the edgers and cut-offs for completing the previously unfinished lumber; and on that account they introduced and used very many hand-barrows or carts, while the better way to have

overcome that difficulty, in the opinion of this defendant, would have been to have had one or more cranes for that purpose, as most
428 other mills have in similar cases, but said saw mill never had any cranes in it to this defendant's knowledge or belief.

Forty-second. To the forty-second interrogatory he says, that the nature of the soil, on which and in which the foundation of the bulkhead or front piling of the saw mill built by Medbury and Aldrich rested was bad, there was a depth of about nine feet of quick sand there, as near as this defendant was able to ascertain. It was very bad at that particular point, while at a point thirty or forty feet further up stream, where it was planned, intended, and agreed to put the bulkhead for the said saw mill fifty by one hundred and fifty feet in size, it was very good. It would then have been quite out of the quicksand, and would have mostly rested upon and had a strong and hard calcareous clay foundation. It would have then had the same foundation that the old single saw mill that they tore down had, as he supposed at the time principally for that very purpose, which had stood there successfully for about twenty years, resting simply on mud sills laid upon it, while the bulkhead to the flume of that mill, which stopped and controlled the water, was, during all the time he knew it which was over seven years, exceedingly tight, safe, and secure. The difference in the two locations, only thirty or forty feet apart, is remarkakble, though not uncommon in alluvial districts. It was where this clay cropped out at a point or turn in the hill immediately back of it, and from thence the clay or hard pan dipped or sloped off quite rapidly under a bed or deposit of very active and treacherous quicksand, and into a very springy place, which had an outlet to the river below where the tail race to all the said mills was made—all which had come to this defendant's knowledge by some experience, which led him to examine closely and test it carefully. In eighteen hundred and forty-seven, when he first came into possession of this property, most of the lower timbers to the old single saw mill and flume, which had then been built some twelve or thir-
429 teen years or more, had become very much decayed—on which account said mill had not been run for some time, and he overhauled it and caused new timbers to be put in in place of all the decayed timbers, and made a very good mill of it again. In doing so, he found its foundations to be exceedingly good, as before stated, at the same time he found that the then new saw mill, so called, (the said double saw mill,) the bulkhead of which was located some forty to eighty feet further out into this springy land, from near the point of the hill where stood said old single saw mill, which stood mostly in what is now the Main street, which street was not located then as now, had not so good a foundation, that it trembled considerably when running, and a great deal of water was constantly leaking through its bulkhead or front sheet piling; that he then examined into it carefully, and found on such examination, and by inquiry, and information thus obtained from parties who had assisted in building it, what the character of its foundation was and how the superstructure and bulkhead of said mill were made. That the mill was placed

on hewed flag timbers put tight together, and placed about five feet into the quicksand below the surface of the water in the river, effected by building around it a coffer dam and sheet piling to keep back the quicksand, the water being pumped out and kept out of the way by means of Archimedian screws or spiral pumps, driven by horse power, and then the main bulkhead sheet piled with a great deal of care. But that the mill up to that time had not been a success, and in fact had a never had full head of water put upon its bulkhead to test its strength. Soon after this defendant had endeavored to repair said bulkhead, as well as he could then conveniently do, by more sheet piling, &c., for the purpose of strengthening and tightening it, and the full head of water was put on when the bulkhead gave way and the whole flow of water went under the mill sweeping out the quicksand, as near as he could ascertain down, to the hard pan, and
430 letting the mill down on the upper or bulkhead side about five feet, leaving the mill about three and a half feet out of level. Then it was that this defendant had a borer made, so that he could bore and ascertain very nearly what was the nature and condition of the soil, and especially the quicksand, and what the nature of the soil or material under it was, and he found the hard pan under the old saw mill to dip off in that direction, and away from the point of the hill, and nearly on the angle of the pitch of the hill itself, until it got about nine feet below the low water surface, when it seemed to lead off then on nearly a level plain, until it came up or cropped out again on the other side of the river or valley, and while much of the valley above this hard pan strata was intermixed with gravel, pebble stones, and boulders, in this particular springy "sink hole," where these mills were, was the liveliest and most active kind of quicksand. There was no difficulty in getting there a good foundation to hold up a building substantially of immense weight by driving good and suitable piles thoroughly through the quicksand, and well into the hard pan below, with a heavy pile hammer, but the difficulty lay in making a good and tight bulkhead there to hold the heavy pressure of eight feet head of water against this quicksand, which was almost as ready to move as water itself.

Forty-third. To the forty-third interrogatory he says, that if said saw mill had been erected fifty feet by one hundred and fifty feet in size, upon the foundation as commenced by driving piles in the fall of eighteen hundred and fifty-four, the foundations for the bulkhead and front piling would have been about thirty or forty feet further east, at the original base of the point of the hill, where the said old single saw mill stood well and sufficient for about twenty years, and which said Medberry and Aldrich removed, as they, or at least one of them stated to this defendant at the time, for the purpose of placing
431 the new saw mill there, fifty feet by one hundred and fifty feet in size, and at that particular place it was very good, hard and firm ground for making a good and secure bulkhead.

432 Forty-fourth. To the forty-fourth interrogatory he says, that he went from Detroit, in the State of Michigan, where he was then residing, to attend the sale of said mortgaged premises at

Watervleit, &c., which was advertized, under the decree of foreclosure, to take place at Berrien, the county seat of said county of Berrien, in said State, on the first day of April, A. D. eighteen hundred and sixty-three, and when he arrived at Niles, ten miles from where said sale was advertized to take place, this defendant met there, at said Niles, in the office of the circuit court commissioner, whose duty it was to make the sale, two elderly gentleman, one of them by the name of Haight and the other Whaling, who represented themselves to this defendant, and to said commissioner, as being interested in said sale, on account of their interest in some way connected with the Empire mill, in Milwaukee, on which was said mortgage, in this suit depending, and that they had a deep interest in the result of said sale on that account, and that they had come over and were there on their way to attend said sale; said Haight and Whaling then requested this defendant to consent to a postponement of said sale, in order, as they stated, to give them time to go to Watervleit and examine said property so to be sold, and ascertain its value and condition, and to prepare themselves more fully than they then were in order to bid on said property, and thereby try and save themselves and other parties whom, they stated, they represented, from any loss on account of this said mortgage on said Empire mills, &c., now at issue in this cause.

Whereupon, this defendant did then and there, at Niles aforesaid, grant to said Haight and Whaling, his consent to such postponement of the sale of said Watervleit property for two weeks, as they then and there requested, and for the reason and purpose which said Haight and Whaling then stated to him, and for no other reason, object, or purpose, was his consent given for said postponement, and therefore said sale did not take place on said first day of April, 1863, but was postponed to accommodate them and any other parties interested therein on account of said mortgage at issue in this cause,

433 until the fifteenth day of April thereafter, and said Haight, on or about the said fifteenth day of April, stated to this defendant, that he, said Haight and said Whaling, had been to said Watervleit and had looked over and examined said property, and that he, said Haight, was then prepared and intended to bid on said property.

Forty-fifth. To the forty-fifth interrogatory he says, that he was present at Berrien, on the adjourned day of said sale. Said Mr. Haight, and a gentleman with him, whose name this defendant understood to be Whaling, son of the Whaling named in his answer to the forty-fourth interrogatory, were present at said sale, Berrill A. Olney, Galen M. Fisher, Franklin Muzzy, and many other gentlemen, some of whom known to this defendant, but whose names he cannot now state, and some others who were strangers to him; several of those present bid at the sale, but how many he is unable to state. Franklin Muzzy bid, and defendant knows that said Haight and this defendant severally bid a great many times. The two highest bids made were, one by said Haight, at nineteen thousand five hundred dollars, being the highest bid he or any one made,

except the last bid made by this defendant for himself, and said Burrill A. Olney and Galen M. Fisher, who were present, at nineteen thousand six hundred dollars, whereupon said Haight declared himself unwilling to, and did not bid any more, and there being no more or higher bids offered, and the sale thereafter being well cried and offered for more bids by the commissioner, who made the sale, the property was then struck off and declared sold to this defendant, it being for himself, and said Olney and Fisher. The said sale was conducted in every way, so far as this defendant has any knowledge or belief, in an open, public, and legal manner.

Forty-six. To the forty-sixth interrogatory he says, that the condition of the said property when this defendant first saw it after said sale, which was on or about the 17th day of said April, after said sale, was exceedingly bad; there was no part or portion of it left there, that the defendant then saw there in all his diligent searches and examinations, and from inquiries about it, that he can say was in good order and condition. To "state its condition
434 as minutely, and with as much detail as he can" is neither an easy or pleasant task, but he will try.

1st. Said shop, or all that was left of it, that this defendant had reserved for his deaf mute brother, or intended to reserve, with its water power, in his sale to said Medberry and Aldrich, was cut off from its basement, which latter, together with the trunk, flume, wheelhouse, water wheel, &c., &c., were entirely gone or destroyed, and the upper part shoved away off some five or six rods from where it formerly stood when so reserved, and there left, one side down in a low wet piece of ground and the other side up two or three feet on some rubbish timber, leaning over just as it was left when moved by order of said Medberry and Aldrich, or at least one of them.

2d. That elegant and well finished grist mill on the said premises when sold to said Medberry and Aldrich, forty by sixty feet in size, two and a half stories high, with two run of excellent French burr stones, corn mill, and all the other necessary and excellent machinery in it, worth at least seven thousand or eight thousand dollars, that always, so far as this defendant ever knew, did exceedingly good work, had been burned up and entirely destroyed, having only the said one thousand dollars insurance upon it, so far as known to this defendant, and that was by him effected on his own motion and expense in the first place, as heretofore stated in his answer to the twenty-eighth interrogatory, and which was at his own expense collected and applied in full on said Medberry and Aldrich's bond and mortgage, for their benefit; and in the place of said grist mill that was so burned, another grist mill, about half the size and capacity of the former, had been erected, and which he found at this time stripped of almost everything that could be well severed from it, even to its bolting cloths, and which was notorious as being incapable, in its best estate, of ever doing good work, and what was left of it was worth, to restore and repair, perhaps three thousand dollars, certainly not exceeding thirty-five hundred dollars, in the opinion of this defendant.

3d. The large barn, about thirty-six by fifty feet in size, two stories high, worth about six hundred dollars, and the shed adjoining the same, about twenty-four by eighty feet in size, worth about two hundred dollars, were both burned up and entirely destroyed, without any insurance upon them to this defendant's knowledge; at the same
435 time they were burned, by or on account of the said bad management and shere carelessless of those in charge of said premises, fire communicated from them, as this defendant has been informed and believes, to a large foundry or furnace building and cooper's shop belonging to this defendant, and entirely destroyed them, by which this defendant was damaged at least from ten to twelve hundred dollars, in the loss of said furnace building and cooper's shop.

4th. All the other buildings upon said premises were dilapidated, more or less decayed, wantonly and otherwise injured, and in ruinous condition.

5th. Most of the fences that formerly enclosed five fields of more than one hundred acres of improved land, were broken down and destroyed, while such as remained were about in the condition of the buildings; and three large orchards on the premises, of as fine fruit as any in the county, had been neglected, the trees very badly injured and open to the commons.

6th. The large dam on the Paw Paw, and also the one on Mill Creek, that made, together with the mill races and waters of these two streams, and a head of nearly two feet covering the Paw Paw lake of about seventeen hundred acres, the water power there, were both broken away. The shoot or slide for passing boats, rafts, and logs, over the dam on the Paw Paw river, was entirely destroyed and gone, and the booms were gone, which, had they been kept properly in place to keep off the flood-wood from the dam and shute, would without any doubt, in the opinion of this defendant, have saved both the dam and the shute, on the said river. The main guard or head gates, to guard and protect the main race and its embankments and all the mills and other works and fixtures situated on said race, (as all the mills were so situated,) were broken away and entirely gone and had been for some years, and the water power had been used by said Medberry and Aldrich, and their grantees, and suffered to remain without any such safeguards and protection, as guards or head gates, such as were formerly there at and previous to the time said Medberry and Aldrich bought said property, and were very important and necessary. The large waste weir and gates which were
436 there when Medberry and Aldrich bought said property, and which were of the greatest necessity and importance for the safety and security of said property, and quite as important as the said guard or head gates, in order to control and waste the redundant water, especially in times of sudden floods from broken dams, &c., above, on the same stream, and very high water in general times of floods, were destroyed. The waste weir and gates that were there, situated in the main race embankment, near the grist mill, and near the lower end of said race, and which wasted the redundant water

out of said race into the river, were, by the orders and direction of said Medberry himself, as this defendant was informed and believes, filled in with dirt and gravel, and effectually closed up, and the wasting of water there stopped and prevented entirely, and no other equal, or one quarter eaqual place provided for the same purpose. There was another attempted of about one-quarter capacity of the other, to draw water from the side of the flume leading to said large double saw mill, which, although entirely insufficient, had the effect to undermine and settle said double saw mill before it was stopped. The first very disastrous result of using said water power without such safes, wastes, and protections, was a very large breach, break, or crevase in the race embankment, just above the grist mill, in 1857, which had it occurred a few rods lower down, abreast said grist mill, would most certainly have destroyed it, (said grist mill;) and then afterwards great damage was occasioned several times on account of the utter impossibility of controlling the redundant water for want of head or guard gates and waste gates; and the last great and exceeding damages were occasioned precisely on the same account, about the time or a little before said Joseph Carr died, which this defendant was informed and believes, was some time on or about the ninth day of August, 1861, and which were never repaired. This way and manner of trying to use said hydraulic works, and controll the water at all times, and for a series of years, without head or guard gates to the race, and proper waste wiers, to stop, draw off, and control the water at will, as it formerly had been done by this defendant with entire success for about seven previous years, before said Medberry and Aldrich bought said property, was, in this defendant's opinion, primarily and entirely the cause, together with the want of proper watchfulness and care, (always necessary
437 in the management of water powers, more or less,) of pretty much all the disasters that occurred or happened to the hydraulic works on said premises, after said Medberry and Aldrich bought them, by any of the floods or high water; all which this defendant at the time greatly feared would be the case, and therefore repeatedly forewarned said Medberry, and also said Carr, and protested against what then seemed to him such reckless management, or rather mismanagement, of the property. It is often the case in the management of the best improved water powers, that by the settling of the earth works, when frost is going out, by the work of crawfish, muskrats, &c., leaks and breaches will begin, which by proper care and attention at the usual times for such things to happen, if proper control of the water is kept, by dropping or shutting the head gates, and then drawing off rapidly the water at the waste weir, when such are kept in good order, a large and disastrous break is prevented and soon repaired; and with such head gates and waste weir the water can be drawn off occasionally, and always should be, the works under the water looked over, examined, and repaired, if need be, in proper time, before great and disastrous breaks occur; but, to this defendant's knowledge, it was never so in the management of this property, from a few weeks after their buy

ing it, when the main waste weir was filled up, and flood wood allowed to accumulate at the dams and head gates that were there, which forced them out, so that when a breach began there was no alternative, but all had to be, as it generally was, left to its fate, and let it tear and wear away, (which in the general light nature of the soil there, would wear away fast,) and let not only the whole river and mill creek through the breach, (except what could be slowly wasted through the water wheels and small and entirely insufficient wastes they had,) but about two feet in depth raised by the dam all over the seventeen hundred acres, or thereabouts, of surface of the Paw Paw lake, above said mills, had to go through also, and by the time the pent up water had subsided to its natural flow, the breach, of which there was no need with good head gates and waste weirs, of being more than a few cart loads of earth would repair, was made usually more than one hundred feet wide, and sometimes twenty or more feet deep.

There was also at the time of said examination, immediately after the sale of said property, April 15th, 1863, a large crevase, 438 precisely where the one occurred as before stated in 1857, of over one hundred feet wide. The bulkheads to the double saw mill were broken and said mill undermined and settled, and another large crevase made in the race embankment between said saw mill and said grist mill; the machinery and fixtures of the saw mills, like those of the grist mill, were, at some time before, either broken, ruined in some way, or gone, and the mill races above and below, were filled or nearly so with dirt and flood trash.

7th. Most of the valuable timber of pine, oak, &c., had been cut and removed from the premises.

8th. Most of the lands had been sold for taxes.

9th. The said single saw mill was gone entirely.

Forty-seventh. To the forty-seventh interrogatory he says, that there has had to be a very large amount of repairs made to put the water power, mills, and other buildings and improvements in a fit condition for use; this defendant has made drafts and given detailed specifications and directions, both orrally on the premises, and written, for all the most important parts of the repairs, which have been faithfully and thoroughly executed by others, as he believes, but has not been present much of the time while such repairs were being made, and therefore cannot state minutely and particularly in detail all that has been done in order to put the same in a proper condition for use. But he does know new booms have been replaced, where those formerly there were gone; a new slide or shute for passing boats, rafts, logs, &c., over the dam has been put in, similar to the one formerly there, that was gone and destroyed. The large dam on the Paw Paw river has been almost entirely made over new; new guard or head gates have been put into the large race towards its head near the dam, in place of those gone and destroyed; a new waste weir, seventy feet wide, has been put into the large race embankment near the grist mill at the lower end of said race, in place of the one formerly near there, but which Medberry and Aldrich closed up, as

mentioned by this defendant in his answer to the 46th interrogatory; these head gates, dams, and waste weir, &c., had to have the best of pile foundations, and tight double sheet piled bulkheads of about four hundred feet breast or front, and about the same amount
439 of tight double sheet piles driven, to guard against undermining or back tow; the whole more secure if possible, than was required in front of said new saw mill, neither of which has as yet shown any signs of giving way or leaking to this defendant's knowledge, and all the floods are now, as formerly, easily controlled. The dam and waste to the mill creek power, in connection with the other, have also been rebuilt and repaired. The bulk head at the head of the flume to the old double saw mill made new, which had broken away, not by any flood but by unwarrantable drawing and wasting of water out of the side of said flume below it, for want of a proper weir in its proper place for that purpose, and thus it was undermined, at the same time undermining the large double saw mill. The bulk head to the saw mill that Medberry and Aldrich built has been improved and repaired as much as it seemed possible to do it in the quick sand pit where it is situated. The two large breaches in the main race embankments, averaging nearly one hundred feet in breadth, have each been filled up and made secure; all the mill races, both head and tail, have been cleared out of flood wood and earth that have been washed into them; all of the decayed timbers, which was a large proportion of the whole of all the flumes, basements to mills and other buildings, and bridges over the works, railways, &c., had to be and have been taken out and replaced with new timbers, except said double saw mill, and all the mills have had to have a great deal of new machinery and fixtures of various kinds, while some that were broken and otherwise injured, and which could be used, have been repaired. The improved and cleared lands refenced and reclaimed, orchards protected, &c., &c., and many more things done which this defendant is incapable of detailing or enumerating. The whole, strictly on account of repairing and restoring to conditions of use thus far, having cost the company, as near as this defendant can ascertain, certainly not less, and perhaps not a great deal more, than twenty-eight thousand dollars. The exact amount he is unable to state, while not all have yet been repaired. The said large double saw mill has not yet been put in running order and it has been thought, by a majority of its owners, doubtful whether it can
440 be made worth the expense of repairing without building over entirely new, all except the ~~rem~~ near addition built in 1851, which will cost in ordinary times, as estimated, from three to four thousand dollars more.

Forty-eighth. To the forty-eighth interrogatory he says, that he saw and conversed with said John W. Medberry in the street and at the Russell House, in the city of Detroit, Michigan, in the year eighteen hundred and fifty-nine. He cannot state precisely the day, but as near as he can recollect it was about the first of October of that year, and only a few days after receiving from said Medberry and Aldrich by mail the letter which is hereunto annexed, marked as

"exhibit L," and here referred to and made part of this answer.

This defendant did then and there have conversation with said Medbury about the said agreement endorsed upon the mortgage in suit.

He thinks and believes that he then first met said Medbury on Griswold street, not far from the post-office, in Detroit, and after a few commonplace remarks, asked said Medberry what he meant by writing him such a letter, (referring to the last aforesaid letter,) and drawing on him, this defendant, through said Parsons and Fisher, as spoken of in said letter, "exhibit L." Said Medbury replied that it was because said insurance money belonged to him, (said Medberry;) that when he sold his interest in the Watervliet property the agreement was with Carr, &c., that he was to have all the insurance to be collected on account of said grist mill being burned, and this defendant must not pay or apply any insurance money in any other way, but must pay it all to him, (Medberry.) This defendant then said to said Medberry that he had collected of the Ætna Insurance Company, of Hartford, Connecticut, one thousand dollars on the policy he himself obtained, and that that was all the insurance that he had on said mill, and that he had applied it where it belonged as a payment to that amount, and had duly and properly endorsed that amount on their (Medberry and Aldrich) bond and mortgage, and that this defendant had no right to, and could not apply it in any other way;

441 whereupon, said Medberry seemed to be very much excited, and forbid this defendant so applying said insurance money, and demanded repeatedly that this defendant should pay said money to him, said Medberry, and stated that if he did not, he (said Medberry) should take immediate steps to collect it of this defendant.

This defend. then stated to said Medberry that he, this defendant, had long since ceased to be surprised at his (said Medberry's, or said Medberry's or Aldrich's) doings, and repeated to him the conditions of their said mortgage and bond concerning any such insurance money; but said Medberry then and there denied that there were any such conditions, and insisted that this defendant must pay all such insurance money over to him, &c., &c. This defendant then asked said Medberry to step over with him to the Russell House, where said Medberry and Aldrich's bond and mortgage were, and he thought he could satisfy him (Medberry) that what he, this defendant, had stated concerning said insurance clause, and also what he had done in the premises, were correct; which said Medberry at first declined doing, but soon after did accompany this defendant to the said Russell House, where defendant read and showed to said Medberry the clause concerning the insurance, in both their mortgage on said premises and bond, and also the endorsement of the one thousand dollars which this defendant had received on account of said insurance on the said grist mill that was burned; and then said Medberry still insisted on this defendant's paying to him said insurance money, and of his, this defendants, collecting all the payments due upon the said bond and mortgage from Joseph Carr and William Aldrich,

whom he named as having bought said Watervliet property, which this defendant declined to do.

About this stage of said interview, said Medberry asked this defendant to show him (Medberry) the said Milwaukee mortgage now in suit, which this defendant did; and after reading the same, and the said agreement endorsed on the back of the same, several times over, said Medberry asked this defendant if he, this defendant, was not willing then to discharge said Milwaukee mortgage, on account of there being less, or only about twenty thousand dollars, remaining unpaid on the purchase of said Watervliet property, and said
442 it would be a very great accommodation to him if this defendant would do so then, and said expressly that he asked it as a special accommodation, and stated that he thought this defendant was then otherwise amply secured for the amount remaining unpaid. Said Medberry did not then claim that the conditions for its discharge had been complied with at all. This defendant, in reply, stated to said Medberry, that no securities would then be given up until the payments for said Watervliet property were all made, and then, of course, all the securities would be duly discharged; upon which said Medberry then requested and urged that this defendant would "put them through," as he expressed it, (meaning said Carr and William Aldrich,) and not give them any lenity or let them get behind on the payments for said Watervliet property, so that, as he stated, "said Milwaukee mortgage may be discharged," when said interview ended; and this defendant has never since been drawn on or asked for said insurance money, or for a discharge of the said Milwaukee mortgage now in suit by said Medberry and Aldrich, or either of them.

Forty-ninth. To the forty-ninth interrogatory he says, that the following named buildings were upon said property at Watervliet, at the time this defendant sold the same to said Medberry and Aldrich, on September 28th, 1854, which were all framed and built of wood, viz:

One grist mill, forty feet by sixty feet in size, two and a half stories high.

One single saw mill, about twenty-two by fifty feet in size, one story above basement.

One double saw mill, about forty by one hundred and ten feet in size, one story above basement.

One workshop, about twenty-four by thirty feet in size, one and a half stories above basement.

One new store building, about twenty-two by seventy feet in size, two stories high.

One old store building, about twenty-four by thirty-six feet in size, one and a half stories high.

One hotel building, about thirty-four by forty-four feet in size, three stories high.

One boarding house, about twenty-four by sixty feet in size, one and a half stories high.

One boarding-house, about twenty-two by twenty-eight feet in size, two stories high.

One dwelling house, about twenty-four by forty-four feet in size, one and a half stories high.

One dwelling house, about eighteen by thirty-four feet in size, one and a half stories high.

One dwelling house, about eighteen by twenty-four feet in size, one and a half stories high.

One dwelling house, about sixteen by twenty-four feet in size, one story high.

One barn, about thirty-six by fifty feet in size, two stories high.

One barn-shed, about twenty-four by eighty feet in size, one story high.

One drying kiln building, and one ice house.

And the usual quantity of out-buildings for the same.

That during the time said Medberry and Aldrich and their
443 grantees had possession of said premises, the said grist mill, of the value of about seven thousand dollars, was destroyed by fire; and the said barn and barn-shed, of the value of about eight hundred dollars, were also destroyed by fire—the latter without any insurance, the former with one thousand dollars insurance, which was insured and collected by this defendant, and the amount thereof duly endorsed by him upon said Medberry and Aldrich's bond and mortgage, on 15th December, A. D. 1858, as a payment of that amount upon the purchase price of said premises.

Fiftieth. To the fiftieth interrogatory he says, that neither said Medberry and Aldrich, or their grantees, paid or kept paid at the proper time, the taxes upon said premises; nearly all of them were sold for taxes, and more than half of them were never redeemed by said Medberry and Aldrich, or their grantees, and tax deeds were issued by the State of Michigan upon them, some of which have been reclaimed by this defendant and his copartners, and some could not be only by purchase outright, after being stripped of the valuable timber upon them.

Fifty-first. To the fifty-first interrogatory he says, that said Medberry and Aldrich never paid promptly, at any time whatever, the installments as they became due upon their said bond and mortgage, and that when they did pay it was always under some condition of exaction to lessen the full value of the payments.

This defendant was never able to collect or obtain from said Medberry and Aldrich any of the said installments in the ordinary or usual way and manner of making collections, although he repeatedly tried and endeavored to do so, by writing respectfully to them after the same were due to him, and asking them to remit by drawing on them for any amount they could or would be pleased to pay, which drafts were never honored by any payments, and by repeatedly sending to their place of business agents especially employed for that purpose with their bond, and directed to accept and receive from them in currency, and endorse thereon, any sum or portion of what was due—all which failed in every instance. And, therefore, he was

forced and compelled, in order to collect and obtain said in-
444 stallments which he did collect of them, and others that he has

never as yet been able to collect, to make extraordinary efforts, to travel thousands of miles, to expend over one thousand dollars of money, and to waste and expend months on months of time, to his great disadvantage and inconvenience, all which might and would have been saved to him and avoided had said Medberry and Aldrich kept their engagements good with him.

And lastly. In answer to the last direct interrogatory this defendant says, in reference to the conversation between himself and the said Medbury, at said Watervliet, on the seventh day of April, 1856, respecting the shop of the deaf mute brother of this defendant, referred to in his answer to the eighteenth interrogatory, in which this defendant stated that he had given to said Medberry many reasons why his said brother could not occupy the basement of said saw mill for his shop, that he well remembers that in such conversation he then had with said Medberry about the destruction of said shop, while standing or sitting before the wreck of it, on said seventh day of April, that in reply to this defendant's demand upon him that they, said Medberry and Aldrich, who had caused the destruction of said shop and water privilege, must and should restore the same to his said brother without further unnecessary delay, said Medberry asked this defendant how his said brother would like to have room in the basement of said saw mill they were then building there, and said that when they got said mill running that said brother could throw his driving belt on to a pulley on their shaft; and said Medberry did ask this defendant to go down with him, said Medberry, (which would have then been but a few rods to go,) and see how it could be so arranged, &c. But this defendant then refused to, and did not then, nor at any other time, go into said basement with said Medberry to see how any such arrangements could be made there; but he did then and there reply to said Medberry in a very decided manner, that there was no use of going there to see about any such arrangement, for he, this defendant, then knew very well that it would not do at all, and then stated to said Medberry some of the reasons why it would not do for such purpose, which were
445 mainly as follows, viz:

1st. They would have no room, the size of said shop they had destroyed, to spare there, and that there was not even that amount of vacant space in the whole basement of their mill.

2d. If there was room there it would be no place for any human being to attempt to stay in and store and do good work for any length of time, when the said mill was running with such kind of water wheels, placed and running in so many places as those they were putting in there, that would throw water all over it, (for this defendant, when once in said mill, had looked down into said basement and then saw, knew, and comprehended it all fully,) and that if by any possibility the direct water itself could be kept off from him (his brother) and his work, that the dampness and noxious affluvia of so much agitated water could not; all which would very soon destroy his brother's health if he was in there, if not his life, and his tools, machinery, and work. And then, furthermore, in explaining to said Medberry,

he, this defendant, stated to him familiarly that where his said brother's work, his tools and machinery were, there seemed to be almost his home, except only while taking his meals and sleep, and that his brother's habit was to be at his work in his shop from early morning till late at night, for there was his main and principal enjoyment; and that probably, from his unfortunate condition, said brother took but very little interest the common diversions and socials of life; that his pleasure was in making something nice and useful, in either wood or iron; that his pride was never to make a poor thing, and his ambition was to make whatever he wrought better than anybody else could; and for that reason his materials, both which he wrought and worked with, must be of the best kind, and especially the timber that he used must be thoroughly seasoned, while in that basement it could not be and remain so, &c.

3d. That if his work or machinery was placed in connection with the machinery of said mill, his brother would be dependant upon the running, motion, and action of their, said Medberry and Aldrich's, machinery, which would be beyond his control; that when their mill was running to its full capacity, (as sometimes it would be likely to,) then he, said
446 brother, could not run his machinery with any degree of efficiency or power; and if his brother was sometimes obliged to run his machinery to its full capacity, to meet an engagement or otherwise, then the said saw mill could not, and very likely there would be difficulty about it. That said brother, this defendant knew, would want his works separate and independent, to open and shut up whenever and as he pleased, and to use his privilege of water, when and as he pleased, and to have his shop as he had it before they destroyed it, which was dry, warm, light, airy and healthy to live and work in, to dry, season and store the timber that he worked, and to store and dispose of his work when finished; none of which pertained to or could be done in the almost inaccessible basement of said saw mill; and lastly, that his said brother, this defend- knew, could never stand the harsh and rumbling noises of rolling logs, handling lumber, chopping, pounding, &c., that would necessarily be there over his head, and be quiet in the room that would be allotted to him, for the reason, that although deaf from his birth, yet he was always more sensative to such heavy, jarring, and grating sounds than are those who can hear, even causing him sometimes most intense pain and distress in his head, or on the imperfect drum of the ear, &c. To all which said Medberry then, notwithstanding this defendant's positive objections thus addressed to him, still urged that it could be made every way proper and comfortable, and convenient for his said brother's business, and when he left this defendant on that occasion and interview, he said and agreed with this defendant concerning said shop, that he would see said Aldrich, his partner, about it and let this defendant know what they would do concerning it, but from the time of that interview he never again saw either said Medberry or said Aldrich at Watervleit. And he further states that after parting with said Medberry on that interview and conversation, this

defendant went directly to his lodgings where he met his said deaf and dumb brother and asked him by signs, (in which manner they were in the habit of conversing and with great facility,) how he would like to have a room and water power in the basement of the said new saw mill until his shop could be retsored; when quick as thought his brother objected, and gave his reasons by motions in less time
447 than this witness could state them orally or by word of mouth; that it would be a damp wet place; that the water would fly all about there when the mill run, swell his lumber, rust his tools and machinery and make him sick, and that he would not go there any way.

He further states, that the next time he heard from said Medberry and Aldrich, or either of them, directly or indirectly, as per said agreement of said Medberry with this defendant, (to which they allude in the letter now referred to) to see Aldrich, his partner, and let him know what they would do about it, &c., was contained in a letter dated at "Watervleit, May 19, 1856," which is hereunto annexed and marked as "exhibit P," and which is signed in the handwriting of said Medberry, and was properly addressed to this defendant at Palmer, Massachusetts, where this defendant received the same by mail, and where said Medberry then knew, as this defendant verily believes, that this defendant then was and had been for more than a month; and the next time thereafter that this defendant heard from said Medberry and Aldrich, or either of them, concerning said shop, was contained in the postscript to a letter hereunto annexed and marked as "exhibit Q," all which, is written in the handwriting of said Medberry, and was addressed to this defendant at said Palmer. No part of any of the propositions in either of said letters (exhibit P & Q,) contained, did this defendant ever accept or consent to, at any time or any way or manner whatever. And in further answer to said last interrogatory, this defendant says, in reference to, and the matter contained in said letter of J. W. Medbery, marked "exhibit Q." that said Medbery had, some time previous to July nineteenth, eighteen huudred and fifty-six, written to this defendant, in a letter which is now mislaid or lost, at least this defendant has been unable to find it, although he has diligently searched for it, that he, Medbery, either had then sold or wanted to sell his mortgage interest in the said Empire mills, &c., in Milwaukee, and on that account desired and requested this defendant to discharge said mortgage thereon, which is "exhibit D," attached hereto, on which this said suit is brought. This defendant well remembers thinking it rather a cool request, and supposing that Medbery must have forgotten the terms and conditions of the "codicil" or endorsed agreement on the back of said mortgage, and simply replied, as he finds by an entry in his diary of July 19th, 1856, by copying and sending him the agreement endorsed on the Milwaukee mortgage,
448 "exhibit D," and then stating it was all the conditions he knew of, which fully explained itself, &c., to which said letter dated "Milwaukee, August 5th, 1856," and marked as "exhibit Q," is in reply; said insurance therein mentioned of four thousand dollars was

never assigned this defendant, or at any rate was never presented or delivered to him by said Medbery and Aldrich, or either of them, or by any other person, or ever afterwards mentioned to him, and this defendant never had any such insurance, and that in fact was the only time that the subject of any insurance or policies of insurance on said new saw mill built at Watervleit, by said Medbery and Aldrich, as having been obtained, or being on hand ready to be assigned, or that were assigned, or that they or either of them wanted to assign to this defendant, was ever made known to this defendant thereafter.

ISAAC N. SWAIN.

449 *Answers of Isaac N Swain, the witness before named, to the cross-interrogatories propounded to him annexed to the foregoing commission, in the case of Stephen H. Seamans et al.* vs. *said Isaac N. Swain.*

In answer to the first cross-interrogatory he says, that he has no recollection, remembrance, knowledge or belief, that he ever did at any time receive from John W. Medberry and James F. Aldrich, or either of them, or from any other person or other source, for or on account of the said Medbery and Aldrich, or either of them, any policies of insurance upon the saw mill built by Medbery and Aldrich at Watervleit, Michigan, whether separately insured or insured in connection with other insurable property at Watervleit, Michigan, except two certain policies that he, this defendant, procured on or about the tenth day of October, A. D. eighteen hundred and fifty seven, on said saw mill, and other insurable property together; one of which was for $1,500, issued by the Ætna Fire Insurance Company of Hartford, Connecticut, and the other was also for $1,500, issued by the Phœnix Fire Insurance Company of said Hartford; and three other certain policies which he, this defendant, procured on or about the twenty-seventh day of September, 1858, on said saw mill and other insurable property together, which were issued by three fire insurance companies, he believes, all of the city of New York. The names of said companies he cannot state definitely, on account of said policies being now mislaid or lost, but he believes their names are the Market, Resolute, and Irving, and were each for the sum insured of two thousand dollars, making for the said three policies together, the amount insured six thousand dollars; and he

450 has now stated all that he has any recollection or knowledge of having obtained or received from any person or persons, or from any source, for or on account of said Medbery and Aldrich, as aforesaid, any part of which was upon said saw mill built by Medbery and Aldrich at Watervleit, Michigan.

Second. To the second cross-interrogatory he says, that the largest amount of insurance that he procured in any year, and all the amounts that he ever did procure upon the saw mill built by Medbery and Aldrich, and which insurance was not separate and distinct on said saw mill alone, but included other insurable property then and there belonging to Medbery and Aldrich at Watervleit, Michigan, was in the year eighteen hundred and fifty-seven, three thousand

dollars; and in the year 1858, $6,000. That is to say, the policies amounted to those sums, in which was included said saw mill built by Medbery and Aldrich, together with other insurable property, all of which were covered by one and the same policy or polices.

Third. To the third cross-interrogatory he says, that he is entirely and positively sure, that he never did request of Medbery and Aldrich, or either of them, the privilege of procuring for them or on their account, insurance upon said saw mill in insurance companies to be selected by him, for the reason that he already had that privilege and the right to do so in case they failed to do it, (which they certainly did fail to do,) by the terms and conditions of the insurance clause contained in the mortgage executed by said Medbery and Aldrich, and their wives, to this defendant upon the premises at Watervleit,
451 bearing date the 14th day of April, 1855, to which he refers for greater certainty, and for the further reason, that he did not want to advance the money for them which he well knew, from other transactions he had had with them, they would not be prompt to repay. And said Medbury and Aldrich certainly never did pay to this defendant any money whatever for that purpose, to enable him to do so with, and he says that he certainly never did object to any of the companies in which said Medberry and Aldrich had (if they ever had) procured said mill to be insured, or to the amount or insufficiency of insurance upon said saw mill, for the reason that he did not know, or have any knowledge of any such insurance being obtained by them of any company; and if they did, they were not assigned and presented, or delivered to this defendant, so far as he has any knowledge whatever; and this defendant is not aware, and certainly has no recollection, knowledge, or belief, that he ever objected to any of the insurance policies which they did obtain and assign, or offer to assign to him, on any of the insurable property on said premises, excepting only the first policy, which was assigned and presented to him by the hands of James F. Aldrich, in the city of Chicago, when the principal ~~witness~~ of the trade were delivered and exchanged, on the fourteenth day of April, 1855, and which was the policy No. 10,657, issued by the Jackson County Mutual Fire Insurance Company, of Michigan, for $6,000, hereunto annexed, and marked "Exhibit E," and which was on other insurable property on said premises at Watervleit than said saw mill, which was not then built, and which said policy, when assigned and so delivered, was invalid
452 and good for nothing, as this defendant was informed two days afterwards by the secretary of said insurance company, when this defendant called at said company's office in Jackson, Michigan, for the purpose of having said assignment consented to, according to the rules of said company; and although at the request of this defendant the said secretary (M. E. Dyer) did there sign the consent, as will appear thereon, still he said it was then not good on account of Medbury and Aldrichs not having paid the premium, and the said secretary then warned this defendant that he, this defendant, would have to take the chances whether it ever would be good or not. And this defendant says, that he was after-

wards, to wit, on or about the twenty-fourth day of August, 1857, also informed in a letter from said secretary, that the said policy was then void, as by his letter hereunto annexed, marked "Exhibit M," will appear. And he has also been recently informed, by an examination of the books of said company, that said policy was never afterwards made good by Medberry and Aldrichs paying the assessments on their premium note, &c., given on account of said policy; and he says that he certainly never did object to any insufficiency of insurance upon said saw mill alone, separately, distinctly, or particularly, at all; and only in a general way did he complain of the insufficiency of the insurance which they effected and assigned to him, as they had in their contract and their said mortgage agreed to do, on all the insurable property on said premises, including the large saw mill which they had agreed to build there, of all which he did often and repeatedly complain to them, both personally and by often repeated letters to them on that subject. And he says, that it was not until on or about the 10th day of October, A. D. 1857, and when
453 he had no insurance at all on any of the insurable property on said premises, and after, as before stated, often repeated complaints as well as demands on them for insurance, which they neglected and finally refused, on the ~~plan,~~ as they stated to him, that plea times were hard and they could not afford it, and when this defendant was preparing and taking measures to foreclose their mortgage on said premises on account of their numerous defaults in payments, and in other conditions of said mortgage, he did, finally, on his own motion and because he felt himself compelled and forced to do so, for his own security, and without then or previously thereto, requesting of them any privilege to do so, but solely and wholly on account and by virtue of his right to do so, as provided in their said mortgage, as before stated, apply for and obtain some insurance on some, but not all of the insurable property on said premises, then liable to said insurance provision, and he then paid of his own money, and without their knowledge or consent, (otherwise than in said insurance clause in said mortgage contained,) for the premiums of such insurance, to Rodney C. Paine, of Niles, Michigan, the insurance agent of whom he obtained the policies of insurance, the sum of two hundred and thirty-six dollars and fifty cents, and again when said policies so obtained were about to expire, this defendant sought and endeavored to have the same policies renewed, and to obtain more insurance on the said insurable property on said premises, which was declined, for reasons set forth in a letter from said Paine to him, bearing date "Niles, Sept. 24, 1858," hereto annexed, marked "Exhibit N," and to which he refers in the county where said premises were situated; and he then, on or about the 27th day of September, A. D. 1858, acting wholly on his own motion, and by the same authority
454 as before stated, procured, as he has already stated in his answer to the first cross-interrogatory, three other policies o insurance in the city of New York, of two thousand dollars each being the same referred to in said answer, for which he again paid (and without then being reimbursed the money he had before paid,

his own money, without the knowledge or other consent, as before stated, of said Medberry and Aldrich, or either of them, for the premiums on said last-named insurance, the sum of two hundred and ten dollars.

Fourth. To the fourth cross-interrogatory he says, that on or about the twenty-seventh day of November, A. D. 1858, being then at said Niles, on his way to attend the sale of said mortgaged premises, which had been duly advertised to take place on that day at Berrien, Berrien county, Michigan, he was met by two men, (both previously thereto strangers to him,) the name of one was Joseph Carr and the other William Aldrich, who represented themselves, and presented to him writings and other evidences to that effect, as having purchased the said mortgaged premises of said Medbury and Aldrich, subject to this defendant's claims thereon, and they also represented to this defendant that they were prepared and desirous of paying up this defendant's claim thereon, which was past due, in order to stay further legal proceedings on the foreclosure, according to law, &c., there then being a large amount not then fallen due on said mortgage on said premises; whereupon, this defendant, on the one part, and said Joseph Carr and William Aldrich on the other part, then and there, at said Niles, went into a general accounting together concerning said mortgage account then past due; and this defendant then presented to them the account on his part, made out in
455 the name of said Medberry and Aldrich, which said Carr and William Aldrich then paid to him. And this defendant states, that in said account then presented by him to, and paid by said Carr and William Aldrich, were, among other items, five items and not more, concerning said insurance, as stated in his answer to the third cross-interrogatory. The words and figures of said five items concerning such insurance, were as follows, viz:

Oct. 12, '57. To insurance prem's paid R. C. Paine, as per rec't.....	$236 50	
Sept. 28, '58. Int. on this prem'm, 11 mo's 16 d's, at 7 p. c.....	15 92	
	252 42	
Nov. 27, '58. Int. on this am't from Sept. 28, '58, 1 mo. 29 d's, at 10 p. c..	4 13	
		256 55
Sept. 27, '58. Insurance premiums paid in New York.....	2 10	
Nov. 27, '58. Interest on this $210 00, 2 mo's, at 10 p. c.....	3 50	
		213 50

Which at that time was intended to be made strictly in accordance with the terms of said insurance clause, contained in said mortgage upon said premises, at Watervleit, and then being in process of foreclosure, which was then there before both parties, and which they then accounted upon, together with the vouchers for said premiums paid by this defendant, and by him then and there presented and

given up to said Carr and William Aldrich, which amounted in all, for the said premiums, according to said vouchers, to four hundred and forty-six dollars and fifty cents, and for interest, as then reckoned thereon, the further sum of twenty-three dollars and fifty-five cents; total amount, $470 05. And he says that said total amount of $470 05, which was then allowed and paid by said Joseph Carr and William Aldrich to him, was all that was ever paid or allowed to this defendant, or to any other person or persons for his benefit, or on his account, on account of any insurance effected by him, said defendant, on any of the insurable property on said mortgaged premises, including said saw mill built by said Medbury and Aldrich, by or on ac-
456 count of any person or persons at any time or times, in any place, or in any way or manner whatever, to the present time; and and he says that said Medberry and Aldrich, nor either of them, ever repaid, or proposed, or offered to repay to this defendant any insurance, or any part of any insurance money at all which was paid and advanced by him, this defendant, for premiums or for interest thereon, or for his time and expense necessarily incurred in procuring the same, or for collecting any losses on any of said policies.

Fifth. To the 5th cross-interrogatory he says, that he was at said Watervliet, Michigan, in the spring of 1856, previous to the 13th day of April of that year, and he positively knows that he was not at said Watervliet at any time after the said 13th day of April, in the spring or in the summer of the year 1856. He well remembers being in plain sight of said saw mill, built by said Medberry and Aldrich, at Watervleit, on the 7th day of April, 1856, and believes that that was the last time he saw said saw mill, to be near to it in any part of said year 1856. On the said 7th day of said April he then and there had some conversation with said John W. Medberry concerning the shop and water power which he, this defendant, reserved for his deaf and dumb brother, and also concerning said saw mill. He was then, all through said conversation, about four or five rods away from said mill, and he positively knows that he was not at said saw mill, or near to it after the said thirteenth day of said April, in the spring or summer of the year 1856. He says that he was at said saw mill at one or more times after the building of said saw mill was com-
457 menced, and before the same was completed or in running order, or sawing lumber. But it was between the twentieth day of January, 1856, when he arrived at said Watervleit, after an absence from there then of over nine months, and the said 13th day of said April in that year, when he again left Watervleit, and was then absent thereafter for more than six months. He says that he was at said saw mill after the same was in running condition, for the first time, about the middle of October, A. D. 1857.

Sixth. To the sixth cross-interrogatory he says, that said Medbury & Aldrich did not, to this defendant's knowledge, information, or belief, after the erection of their saw mill, provide a suitable place or shop in, or in connection with said saw mill, under cover, for the use of this defendant's deaf and mute brother, with water power to drive the necessary machinery thereof, and not to this defendant's knowl-

edge, information or belief, did said brother occupy and use any shop or place of business so provided by said Medbury & Aldrich, and he says that his said deaf and mute brother is now in the sixty-fourth year of his age, and that if he at any time ever used or occupied any such shop or place of business provided by said Medbury & Aldrich, it was, and is wholly and altogether unknown to this defendant, and this defendant does not believe it was possible for his said brother to occupy the basement of said saw mill as a shop for his business.

Seventh. To the seventh cross-interrogatory he says, that he is a mechanic and architect, and has designed and drafted a great
458 many buildings and mills, but cannot say how many, and has laid out a great deal of carpentering, as well as mill-wright work for others to do, and has wrought with tools some, but not a great amount of that kind of work with his own hands, and as to the question of his being a "wheelwright by trade," he says, that he is not, that is, he is not a wagon maker by trade, but he has built or superintended the construction and reconstruction of saw mills and machinery therefor, run by water power one in the village of Concord, Jackson county, and State of Michigan, in 1843, and another in the township of Concord, in the same county, in the year 1845; one in said Watervliet, in the 1847 and 1848, and another at Watervliet in 1849 & 1850, and that he does consider himself an expert, that is experienced in the building of saw mills run by water power, and in reference to the machinery appertaining ~~to~~ thereto.

Eighth. To the eighth cross-interrogatory he says, that, in his opinion, to constitute any first class saw mill of its kind and capacity, it is necessary, first of all, in its construction, that it have a good and firm, and solid foundation, and then sufficient motive power, whether wind, water, or steam, safely, and properly applied, to move or work all its machinery with ease and facility; the building for such a mill should have a good strong frame work of timber, all well roofed over and enclosed from the weather, and of abundant size, and room to work conveniently and easily all the machinery that is put into it, more or less, and with proper and sufficient room, both shape and size, in which to handle the logs and lumber within it with ease and facility, according to the kind of work it is designed to do;
459 after some years of study, and the consulting of experts or experienced persons in that line of business at home and abroad, this defendant had, in his opinion, thought it necessary to adopt the size of fifty feet wide by one hundred and fifty feet long for the first class saw mill which he then designed to build, and he has not yet changed his opinion of its being a good size for such a mill, and for such a first class saw mill as he designed to be built at Watervliet, and propelled by the ~~broad~~ head fall and quantity of water there; the amount and quality of the machinery to be used should be, in his opinion, first, two large breast or pitch-back water wheels, by which to obtain the motive power to propel and drive the other machinery, by means of other wheels in the gearing, and by shafts, belts, and pullies to, and into, all or any necessary part or parts of said mill, and there should be on the first line of saw carriage and railway tracks

a slabber or bolting gang of saws, and then a stock or pony gang of saws directly back, and on the same railway track, leading from the said slabber, which is to supply it with bolts or cants, and then still back of the stock or pony gang, and directly in the same line, both of carriage way and railway, should be an edging table and saw, with a cut-off saw attached, which, thus far, would complete one line of works to slab, bolt, and saw a log into stock boards, and slit, trim, edge, and cut off all such as were unfair and imperfect from the stock gang, of all common length logs in their graduating course lengthwise through said mill into lumber for market, properly assorted as taken from the saws, at whatever stage completed, and then immediately piled upon the attending cars upon the railway track alongside
460 for that purpose, and when loaded to be run out into the piling yard to be properly "stuck up," with lengths, kinds, and qualities together, on the bank of the race or river, ready and convenient to be rafted or shipped to market. Then on a second line of saw and railways should be situated, first, a round gang of saws, that is, a gang to slit through and through a round log into the proper thickness for lumber, and situated farther back than abreast the slabber in order to give plenty of room for storing logs to some extent for night sawing and in the front part of the mill, (the end that first receives the log from the water above the mill is usually called the front or upper end, and the opposite end is called the tail, back or lower end. This explanation is given for the convenience of being better understood,) and directly back of said round gang another edging table with edging saw and cut off saw either attached or separate. The spaces used for said round gang and the edger back of of it should have more length than is required for the stock gang in order to saw if necessary longer stuff, but the procesr of manufacturing, handling and disposing of lumber by this line would be similar to the first, and then there would be plenty of room, and, in this defendant's opinion, there should be a third line of rail and carriage ways for a six feet circular saw, placed near one side, and midway of the length of the mill, for all kinds of coarse and rapid sawing of any lengths up to seventy or seventy-five feet, which, to run each way from the saw would require to be one hundred and fifty feet long, and in the lower story (not a mere basement) a room well lighted, dry, and comfortable, of about fifty by one hundred feet in size, there
461 should be (to work up the slabs and offals of such a mill) two sets of lath and picket sawing works, and a nice dry place there, done off specially for the purpose of working machines for gumming, filing, and setting all the saws for the mill; near the back or lower end of the mill should be the jack works over head, for ~~handling~~ hauling the logs into the mill. There should be for all the slow feeding and motors cone pullies; and for quick motions, loose, slip, or sliding pullies, and as to the quality of all the machinery to be used in such a mill, it should be, in this defendant's opinion, of the best kind.

Ninth. To the ninth cross-interrogatory he says, that he does not think a saw mill could be built with a poor and constantly settling foundation, which would fall short of his estimate, and yet be con-

sidered, by any one competent to judge in such matters, a first class saw mill, but in some other particulars, he thinks, it might fall some short, and yet be considered by some good judges, perhaps, a first class saw mill.

Tenth. To the tenth cross-interrogatory he says, that in his estimate of the size of the mill built by Medbery and Aldrich, he has only included the saw mill, and has not included any platform therewith, except the one covered with a roof on the north side where it is projected over the old lock, waste-water place, eighteen feet, on to the double saw mill, built and standing there when said Medbery and Aldrich bought the said premises; which projection, in his opinion, is nothing more than a mere covered platform—the
462 platform that he did not include, and which is not under cover, he believes, is not connected or joined, at least in any permanent way or manner, to what he calls the saw mill. He thinks, though he is not certain, that some of the planks on the top of said platform are about on a level with the main floor of said saw mill, and some of them may have been attached by nails, though he is not sure of that; he believes there is no lower floor to either the said saw mill or platform at present, and he is not aware that there ever were any; he does not know that a part of the same timbers that support the saw mill, (as named by him,) also support, in part, the platforms, except the said covered projection or platform, which, he thinks, they do; as he has not seen said platforms or said saw mill since these interrogatories were put to him, so as to examine in reference thereto, and therefore cannot state with certainty; he does not know what was the use of said platform, (the main uncovered one,) unless it was to lay a small amount of lumber upon it sometimes, as it could not hold a very large amount, and to hold up a small, low, balloon structure placed upon it in order to cover the end of an edging table; and on and across the northeast corner of said main platform, the only railway for passing lumber from said mill is situated, which, for a short distance, it holds up. The present proprietors who are running said saw mill, do not and have not used it for piling or assorting lumber, as this defendant has been informed and verily believes, and that, if it was away, it would not be missed on that account; with or without said platform being there, the proper place to assort lumber is in the saw mill as it leaves the last
463 saw used upon it; (though there is not near room enough for that in said mill as built by said Medbery and Aldrich, still it is mostly done there notwithstanding;) some of the lumber is assorted in the piling yard. The place to pile the lumber is directly on the banks of the tail race and river, where it can be run to by the cars, and where it can be conveniently rafted or shipped to market at the proper season for rafting or shipping, and that is the point, or those are the places to ship the lumber from said mill, and those places are ample and sufficient.

Eleventh. To the eleventh cross-interrogatory he says, that he believes, from the best information he has, that there were contained in and for a short time used, in the saw mill as built by Med-

bery and Aldrich, three gangs of saws, a round gang, a stock or pony gang, and a ship gang; that the ship gang was never much used, and, owing to some defect in it was, not long after the said mill started to run, how long he does not know precisely, taken out by said Medbery and Aldrich, or their grantees, and a single sash saw put in its place, and driven by the same water wheels that drove said ship gang at the slow motion of about eighty to one hundred strokes per minute. There was one edger, and no machines for cutting laths and pickets that he ever heard of in said mill; there was one jack works for hauling logs into said mill. The cost or value of the round and stock gangs, at the manufacturers' prices at the time they were put into said mill, was about one thousand and fifty dollars each; the ship gang about $1,500; freight to Watervleit and put-up would average about $700 more to each; the edger about
464 $120, complete; the jack works about $600; the jack works were placed in the down ~~steam~~ stream side of said mill; the distance from the up stream side of said mill to the saw gangs is about thirty feet, or midway of the mill; the space, in length, required for similar saw gangs vary very materially, according to the length of the lumber intended to be sawed in them; the length should be at least from eight to ten feet longer than twice the length of the lumber to be sawed; that is for the gang, and about the same length is also required for edging the same number on the edging machines and table; the breadth required for one gang alone would be about sixteen to seventeen feet; that is, the machine and fenders take up about seven feet, and there should be from four to five feet all around to work; in fact to run one gang of saws, two or more gangs of saws placed side by side, would each require the same space in breadth to place them, but not each so much space in breadth to work or run them, but each would require the same length as if alone, according to length of the lumber to be sawed; fifty feet is plenty wide enough for three gangs placed abreast each other.

Twelfth. To the twelfth cross-interrogatory he says, that if a mill had been built by Medbury and Aldrich, of fifty feet in width by one hundred and fifty feet in length, up and down stream, as planned by this defendant, and as said Medbery and Aldrich agreed to properly build and complete it, with their gangs, a six feet circular saw for sawing logs and long timber, jack works, two edgers, and two cut off saws, there would have been no waste room to spare to
465 run them properly; in fact, there would have been little room enough for that purpose on the main floor, and the lath, and picket saws, and machines would have had to be placed in the lower story.

Thirteenth. To the thirteenth cross-interrogatory he says, that if a mill had been built by Medbery and Aldrich, of fifty feet in width by 150 feet feet in length, up and down stream, and only 75 feet had been put under cover, he would have considered the whole concern not properly built and completed for a saw mill fifty by one hundred and fifty feet in size.

Fourteenth. To the 14th cross-interrogatory he says, that it is

usually considered best for lumber, immediately or soon after it is sawed, to pile it where it can be exposed to air, sun, light, and rain.

Fifteenth. To the fifteenth cross-interrogatory he says, that the same amount and kind of machinery could most certainly have been placed in and used to advantage in a mill 50 by 150 feet in size, as was contained in and used in the saw mill built by Medbery and Aldrich, and, in his opinion, a great deal more, and better; 50 feet in width was abundant for even the three gangs abreast, as they put them, although he does not approve of that way of placing them, where it can be avoided, and it can easily be avoided in a geared mill, and how he would have placed such machinery, he thinks he has before fully answered in his answer to the 8th cross-interrogatory concerning a first class saw mill of the same shape and size, and as to what amount of space, in width and length, each machine would require, he believes he has before stated in his answer
466 to the 11th cross-interrogatory, to both of which said answers he respectfully refers as his answer hereto.

Sixteenth. To the 16th cross-interrogatory, he says, that in his opinion, more than two gangs of saws could have been placed in and worked to advantage in a saw mill fifty by 150 feet in size, up and down stream, upon the same premises as mill built by Medbery and Aldrich. In the first place, if it was necessary to carry water to the third gang, they could, in his opinion, have all been placed abreast, in the breadth of 50 feet, and so worked to advantage, and the water carried to them all very near, precisely as the water was carried in the said saw mill which Medbery and Aldrich did build; but he would have preferred breast or pitch-back water wheels, and then geared the machinery, and carried the power to it, on a line back of the slabber, by means of a shaft or belt, and arranged and placed it precisely as before stated in his answer to the 8th cross-interrogatory, to which he again respectfully refers for his further answer hereto.

Seventeenth. To the 17th cross-interrogatory he says, that as to what were the kinds, and dimensions, and quality of the lumber used in the building of the saw mill as built by Medbery and Aldrich, with and without the platform. He would state that he resides about two hundred miles away from said saw mill, and that he has not seen said mill and platform since this cross-interrogatory was presented to his attention, neither did he ever look at and take any account in view or expectation of answering such a question with posi-
467 tive exactness, and therefore cannot state. And as to what was the price per thousand feet of each kind of lumber so used at the mill at Watervleit, Michigan, during the time said mill was building, he says he was not present and made acquainted with the price of each kind of lumber so used at the mill at said Watervleit during the time said mill was being built, and therefore cannot answer as to that with any degree of exactness. And as to how much more lumber in kind and quality would have been required to have built a mill 50 by 150 feet in size, if all under cover, he says, about twice as much, and

if only one-half in length was under cover, how much, he says, about twice as much, also, excepting only about forty-five hundred feet of roof boards, and about 33,000 shingles it would require to cover the other half; that is, assuming that the whole mill is properly built and completed, otherwise except simply covering the half of it with a roof after all the rest is properly built and completed.

Eighteenth. To the 18th cross-interrogatory he says, that, as to how he makes up his estimate of the value of a mill 50 by 150 feet, &c., he would state that, in his opinion, the value of a saw mill propelled by water depends almost entirely upon its practical working, its stability, durability, and capability, and not on what it cost, and that the expense, or what it may have cost at first, oftentimes has but little to do with its value, and therefore he made up his estimate upon what he thought would be the value, as interrogated, of a saw mill, in every way properly built and completed, of the size of 50 by 150 feet.

468 In his estimation and opinion a saw mill 50 by ~~160~~ 150 feet in size, placed on a good, firm, and unyielding foundation, the water safely and securely controlled and properly applied, and all its various parts and departments for a mill of that size properly built and completed, would be double the capacity, do twice the amount of work, and last a great deal longer, and therefore be, at least, twice as valuable as the saw mill that Medbery and Aldrich built at said Watervliet; and that he makes up his estimate of the value of the saw mill, as built by Medbery and Aldrich, of about one-half the size and capacity, and not, in his opinion, properly built and completed, or having a good foundation, or safe and secure control of the water to it, which, also, he considers not well applied, comparatively, in the same way of the other, as not being worth one-half as much; he does not include the platform in such estimate at all. The probable cost of said platform was about six or seven hundred dollars, but its value, in this defendant's opinion and belief, was never half the amount of either sum.

Nineteenth. To the 19th cross-interrogatory he says, that, according to the best of his information, knowledge, and belief, the capacity as to sawing lumber of each of the gangs of saws, as contained in the saw mill as built by Medbery and Aldrich, was, on an average, when the same was new and in order, about 12,000 feet; that is, in a day and night, or twenty-four hours' run.

Twentieth. To the 20th cross-interrogatory he says, that if a mill 50 by 150 feet in size had been properly built and completed, he

469 would have assorted the lumber manufactured in said mill as it came from the saws, and, when completed, placed it on the cars standing on the railway track for that purpose, and when a car was loaded, run it out of the mill on a track to the pile of its kind and quality in the lumber yard or piling ground on the bank of the race or river, convenient for rafting or shipping when said river was in proper condition for doing so, which for about three-fourths of the year it is not, and there piled it if it was to be rafted immediately or soon after; otherwise "stick it up" there for future rafting or shipping. There would have been room enough for tem-

porary storing all that could not be properly placed ~~in~~ the cars during a night's sawing, inside of the mill, alongside conveniently, and out of the way of the proper working of the mill.

Twenty-first. To the 21st cross-interrogatory he says, that the immediate, as well as more remote cause or causes of the condition of the saw mill built by Medbery and Aldrich, as described by him in his answer to the 46th direct interrogatory, was partly the result of previous bad management, and partly of reckless and wanton destruction of it.

From his best information, knowledge, and belief, he says, that such condition and apparent destruction of said saw mill property was not occasioned by any particular freshet which occurred upon the Paw-Paw river, or the river upon which said mill is situated. The freshet which broke the race embankments filled up the race with sand and floodwood, and did considerable other damage to said property, was on or about the 9th day of August, A. D. 1861.

470 This said freshet broke away the temporary dam that had previously been erected in the main race above said mill, in order to run the grist mill. The wheels and other machinery connected with the water power of said saw mill were not broken thereby, that this defendant could ever ascertain, or has ever been able to ascertain, on inquiry for that purpose. He has been informed, and verily believes, that an incompetent and untrustworthy person, by the name of Isaac S. Shank, was in the use and occupancy of said mill at the time said freshet occurred. He believes that said mill was no more abandoned after than before said freshet occurred, and that it had not been in running order for some time when said freshet did occur. There was no manufacturing of lumber by or in said mill for some time before said freshet, until after the purchase thereof at mortgage sale, as he has been informed and verily believes, though he was not there all the time, and, therefore, cannot state positively on this point of his own knowledge.

Twenty-second. To the 22d cross-interrogatory he says, that he is still interested in the said mill and other property formerly belonging to said Medbery and Aldrich, at Watervliet, Michigan. Said mill is now in running order; two gangs and a muley saw are now run in said mill; an edging and cut-off saws and jack works. It is hard to state what the present value of such mill and property is; he does not know, and therefore cannot state, as he has no opinion made up.

ISAAC N. SWAIN.

Sworn to before me, and subscribed in my presence, as certified in my certificate at the close of these depositions.

A. M., *Com'r.*

471 **Deposition of Philo Parsons**, a witness produced, sworn, & examined in the above-entitled cause on the part of the defendant therein, upon interrogatories & cross-interrogatories hereto annexed, and under and by virtue of the commission issued by said court, hereto annexed.

The examination was had on the 25th day of July, A. D. 1865, and taken at the office of Addison Mandell, the commissioner named in said commission, in the city of Detroit, Wayne county, Michigan.

Philo Parsons, a witness sworn and examined on the part and behalf of the defendant, doth depose and say as follows, viz:

First. To the 1st interrogatory he says, that his name is Philo Parsons; his age is 48 years; has no occupation, but is a retired merchant and banker; resides in the city of Detroit, and has known the defendant in said cause over 20 years.

Second. To the 2d interrogatory he says, he saw said defendant in the spring of the year 1856, on the 15th day of April, at his store, or the store of Parsons & Johnson, in the city of Detroit, and afterwards on that day witness saw him on the way to the ferry boat, and at the boat, and there took leave of him, said defendant, who stated that he was then on his way to his place of residence, at Palmer, Massachusetts.

Third. To the 3d interrogatory he says, he knows from memory & recollection, and also from business transactions that he had on that day, the said 15th day of April, A. D. 1856, with said defend-
472 ant, at said Detroit, and entries of account for money paid to said defendant, and for money, and a dratt which said defendant left with him for collection and investment, which, on that day, he made in his account book in his own handwriting, and also from a particular and certain receipt which he wrote and gave to said defendant personally, at Detroit, a true and exact copy of which is in the words and figures following, viz:

"$5,000. Rec'd. Detroit, Mich., Ap'l 15, 1856, of Isaac N. Swain, of Palmer, Massachusetts, five thousand dollars to invest in ten per cent. bonds & mortgages on ample & unincumbered real estate in the city of Detroit, for two years. Interest payable semi-annually. Also Medbery & Aldrich's draft on James F. Aldrich of Chicago, Ill., due July 7 & 10, 1856, for seventeen hundred & thirty-five & $\frac{54}{100}$ dollars, to collect and account to said Swain for the same.

(S'g'd) "PHILO PARSONS."

The original of said receipt is hereto annexed, marked "Exhibit O."

Lastly. To the last interrogatory he says, that on said 15th day of April, A. D. 1856, said defendant, on his way to his home, in Palmer, Massachusetts, left other business in his, witness, charge at Detroit. One thing was for him, witness, to attend to forwarding said defendant's boxes of books, &c., then on their way from Watervliet to Palmer; that they arrived at Detroit, and two days afterwards, to wit, on the 17th of April, 1856, he wrote to said defendant, addressed to him at said Palmer, and enclosed in the letter the forwarding receipt for said boxes, and that on or about the thirtieth day of said April, witness received a letter from said defendant in his handwriting
473 which witness is well acquainted with, and knew it to be his writing, dated Palmer, April 28th, acknowledging the arrival of the forwarding receipt by him at said Palmer, but stating that the

goods had not arrived; that he had delayed writing till then, expecting the loan papers; that he was expecting trees, and that he should be very busy till they were set out. He also says he was in receipt of a letrer from said defendant, in his handwriting, under date of Palmer, Mass., June 9th, 1856, in which he acknowledges the receipt of a letter from witness, written a month before that date, but stated that he had been so much engaged tending men, and so tired when not doing so that he was unable or had neglected to reply; that the trees he had set out looked well; that he was anxious to put them out that they might be growing, and no time lost. Witness also states that he was there, at Palmer, Massachusetts, in July, A. D. 1856, and spent some time there with said defendant, during which said defendant pointed out to him what he had been doing since his return from the west, and what he was intending to do for the purpose of making a pleasant home there. Witness further says, that he was all the time before, and for some time after that time, in constant correspondence with said defendant, during the spring, summer, and fall, before and after his return to the east on the 15th of April, 1856, and that he knows that their business relations were such that said defendant would not go west without seeing him at Detroit; or at least letting him know of it, as most or many of defendant's papers pertaining to his western business were left in his, witness, care, at Detroit,
474 through whom, this witness, he said defendant, at that time, transacted most of his western business; and this witness, from his own very familiar knowledge of said defendant, and his western business at that time, does not believe that said defendant was in the State of Michigan after the said 15th day of April, 1856, until the latter part of the following September.

PHILO PARSONS.

First. To the first cross-interrogatory he says, that he cannot say, of his own knowledge, that said defendant was not at said village of Watervleit at any time during the spring or summer of the year 1856, for the reason that he was not with him in person all the time during the spring and summer of that year, but that he can say from his most intimate connection in business with said defendant, and the papers which he held for said defendant in his western business, and the constant correspondence with him, and of seeing him at Detroit, Michigan, on the 15th day of April, of that year, when on his way to Palmer, Massachusetts, and then of seeing him also at said Palmer, July 16th, of that year, at which time said defendant showed this witness the amount of work that he had done there in grading and setting out of trees, &c., and which he had superintended after he returned from Michigan in the April before, and from his making no allusion to being west, &c.; that this witness does not think or believe that said defendant was in the State of Michigan between April 15, and the latter part of September, of that year, at which latter time this witness saw him at Detroit then on his way west, to Watervliet, &c.

PHILO PARSONS.

Subscribed and sworn to before me, this 25th day of July, A. D. 1865.

ADDISON MANDELL,
Commissioner.

475 STATE OF MICHIGAN,
County of Wayne, ss:

I, Addison Mandell, the commissioner named in the foregoing and annexed commission, do hereby certify that the foregoing depositions of Isaac N. Swain and Philo Parsons, were taken before me, at my office, in the city of Detroit and State of Michigan, under and by virtue of the said commission, and the interrogatories and cross-interrogatories thereto appended, that before taking the same, I administered an oath to said witnesses respectively, that the answers given by them respectively to the interrogatories and cross-interrogatories proposed to them, should be the truth, the whole truth, and nothing but the truth, that the said depositions were respectively reduced to writing by me, and the several interrogatories and cross-interrogatories, and their respective answers thereto read over by me to the said witnesses respectively, who signed the same in my presence; that the testimony of the said Parsons was taken on the twenty-fifth day of July, A. D. eighteen hundred and fifty-six, and the testimony of said Swain was commenced on the nineteenth day June, in said year, and continued from day to day, until the same was concluded; that the several paper writings or exhibits, hereto annexed, were presented and proved by said witnesses, and signed by me and by the witnesses producing the same, and by me marked and attached to said depositions, and said depositions were signed and certified by me as sole commissioner.

Dated August 1st, 1865.

ADDISON MANDELL,
Commissioner.

476 *Exhibit A, No. 1.*

Memorandum of an agreement made in duplicate at Watervleit, in the county of Berrien and State of Michigan, this twenty-eighth day of September, A. D. 1854, between Isaac N. Swain, of Watervleit aforesaid, as party of the first part, and John W. Medbery, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the State of Illinois, of the second part, witnesseth as follows, to wit:

I. The party of the first part agrees to sell to the party of the second part, all those certain pieces or parcels of land, with the fixtures and appurtenances thereunto belonging, situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, viz:

The southwest fractional quarter of section number nine, (9,) in township No. three (3) south, of range No. sixteen, (16) west, containing, according to the United States survey, one hundred and

ninety-three and fifteen hundredths (193 15-100,) acres of land more or less.

Also, the west half of the northeast quarter of section number (17) seventeen, in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, eighty (80) acres of land, more or less.

Also, the west fractional part of the southwest fractional quarter of sec. No. seven, (7,) in township No. three (3) south, of range No. sixteeen (16) west, containing, according to the United States survey, forty-eight and twenty hundredths (48 20-100) acres, more or less.

Also, the southeast quarter of the southwest fractional quarter of sec. No. seven, (7,) in township No. three (3) south, of range No. sixteen (16) west, containing, according to the United States survey, forty (40) acres, more or less.

Also, the north half of the northwest fractional quarter of sec. No. eighteen, (18,) in towsnhip No. three (3) south, of range No. sixteen (16) west, containing, according to the United States survey, sixty-three (63) acres of land, more or less.

Also, the southeast fraction of the northeast fractional quarter of sec. No. eighteen, (18,) in township No. three (3) south, of
477 range No. sixteen (16) west, containing, according to the United States survey, one hundred and twelve and fifty hundredth (112 50-100) acres of land, more of less.

Also, the north fraction of the northeast fractional quarter of sec. No. eighteen, (18,) in township No. three (3) south, of range No. sixteen (16) west, containing, according to the United States survey, twenty-one and seventy hundredths (21 70-100) acres of land, more of less.

Also, the east half of the northeast quarter of sec. No. thirteen, (13,) in township No. three (3) south, of range No. seventeen (17) west, and containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southeast fraction of sec. No. fourteen, (14,) in township No. three (3) south, of range No. seventeen (17) west, containing, according to the United States survey, three and fifty-three hundredths (3 53-100) acres, more or less.

Also, the east half of the northeast quarter of sec. No. twenty-two, (22,) in township No. three (3) south, of range No. seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southwest fractional quarter of the northwest fractional quarter of sec. No. twenty-three, (23,) in township No. three (3) south, of range No. seventeen west, containing, according to the United States survey, thirty-nine and forty hundredths (39 40-100) acres, more or less.

Also, the east half of the northwest fractional quarter of sec. No. twenty-three, (23,) in township No. three south, of range No. seventeen (17) west, containing, according to the United States survey, sixty-nine and fifteen hundredths (69 15-100) acres, more or less.

Also, the undivided one-half of the northeast fractional quarter of sec. No. twenty-three, (23,) in township No. three south, of range No. seventeen (17) west, containing, according to the United States survey, one hundred and sixty acres of land, more or less; less by the bed and bank of the Paw Paw river, as meandered and surveyed by the United States.

Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township No. three (3) south, of range
478 No. seventeen (17) west, as lies north of the center of the main public highway or road leading from Paw Paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervliet aforesaid, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres of land. Always excepting and reserving those certain pieces or parcels of land situated in, and being parts of the above described southwest fractional quarter of said sec. No. twenty-three, (23,) and north of said public highway or road, and also reserving certain other rights and privileges as hereinafter described and specified. That is to say, of said reserves, for the purpose of more conveniently describing said pieces or parcels of land excepted and reserved, be it known that on the south line of said sec. No. twenty-three, (23,) and four (4) chains and fifty-eight links east of the southwest corner of said section No. twenty-three, (23,) is a stake, which we will call a "Point No. one," in the center of Main street, (so called,) being the main public road leading from said point No. one. Thence north 6½ degrees, east towards the Watervliet mills, (so called,) in said township of Watervliet aforesaid, viz: First, a certain piece or parcel of land excepted and reserved from this sale, known, bounded and described as follows, viz: beginning at a stake in the center of said Main street, nine (9) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence north eighty-three and a half (83½) degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet, to the center of said Main street; thence south 6½ degrees, west along said center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances. Also, second, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, eleven (11) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence north
479 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½, east two (2) chains and forty (40) feet, to the said center of said Main street; thence south 6½ degrees, west along said center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

Also, third, a certain piece or parcel of land excepted and reserved from this sale, known, bounded and described as follows, viz:

beginning at a stake in the center of said Main street, thirteen (13) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence south 83½ degrees, east five (5) chains and forty (40) feet; thence north 6½ degrees, east two (2) chains; thence south 83½ degrees, east seven (7) chains and fifty (50) links; thence north 6½ degrees, east four (4) chains; thence north 83½ degrees, west seven (7) chains and fifty (50) links; thence south 6½ degrees, west three (3) chains; thence north 83½ degrees, west five (5) chains and forty, (40) feet to the center of said Main street; thence south 6½ degrees, west along the center of said Main street three (3) chains, to the place of beginning, containing four (4) acres and sixty-eight hundredths (68-100) of an acre of land, with its appurtenances.

Also, fourth, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, fourteen (14) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence north 83½ degrees, west two (2 chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet, to the center of said Main street; thence south 6½ degrees, west along the center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

Also, fifth, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, sixteen (16) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet, to the center of said Main street; thence south 6½ degrees, west along the center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, with its appurtenances.

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Also, sixth, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, seventeen (17) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence south 83½ degrees, east one hundred and seventy-six (176) feet, to the top of the west bluff or hill along Mill creek; thence north 6½ degrees, east sixty-six (66) feet; thence north 83½ degrees, west one hundred seventy-six (176) feet, to the center of said Main street; thence south along the center of said Main street 6½ degrees, west sixty-six (66) feet, to the place of beginning, containing twenty-eight hundredths (28-100) of an acre of land, with its appurtenances.

Also, seventh, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, nineteen (19)

chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence south 83½ degrees, east two (2) chains and forty (40) feet, or to the top of the bluff on the west side of Mill creek; thence north 6½ degrees, east one (1) chain, along the top of said bluff; thence north 83½ degrees, west four (4) chains and eighty (80) feet; thence south 6½ degrees, west one (1) chain; thence south 83½ degrees, east two (2) chains and forty (40) feet, to the center of said Main street, the place of beginning, containing fifty-two (52-100 hundredths of an acre of land, with its appurtenances.

Also, eighth, a certain piece or parcel of land excepted and reserved from this sale, known, and described as follows, viz: beginning at a stake in the center of said Main street, twenty-one
481 (21) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence south 83½ degrees, east four (4) chains; thence north 6½ degrees, east one (1) chain; thence north 83½ degrees, west eight (8) chains and forty (40) feet; thence south 6½ degrees, west one (1) chain; thence south 83½ degrees, east four (4) chains and forty (40) feet, to the center of said Main street, the place of beginning, containing ninety-two hundredths 92-100) of an acre of land, more or less, with its appurtenances.

Also, ninth, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, twenty-three (23) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence north 83½ degrees, west two (2) chains and forty (40) feet; thence north 6½ degrees, east one (1 chain; thence south 83½ degrees, east two (2) chains and forty (40 feet, to the center of said Main street; thence south 6½ degrees, west along the center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, more or less, with its appurtenances.

Also, tenth, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, twenty-four (24) chains and forty-seven and a half (47½) links, north 6½ degrees, east from said point No. one; thence south 83½ degrees, east two (2 chains and twenty-five (25) links; thence north 6½ degrees, east three (3) chains; thence north 83½ degrees, west two (2) chains and twenty five (25) links, to the center of said Main street; thence south 6½ degrees, west three (3) chains, along the center of said Main street to the place of beginning, containing sixty-eight hundredths (68-100 of an acre of land, with its appurtenances.

Also, eleventh, a certain piece or parcel of land excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake in the center of said Main street, twenty-five 25) chains and seventy-five (75) links, north 6½ degrees, east from said point No. one; thence north 83½ degrees, west two (2)
482 chains and forty (40) feet; thence north 6½ degrees, east one (1) chain; thence south 83½ degrees, east two chains and forty (40) feet, to the center of said Main street; thence south 6½ degrees,

east along the center of said Main street one (1) chain, to the place of beginning, containing twenty-six hundredths (26-100) of an acre of land, more or less, with its appurtenances.

Also, twelfth, a certain piece or parcel of land, excepted and reserved from this sale, known and described as being a small lot, two (2) rods wide and six (6) rods long, on which is situated the blacksmith shop now owned by R. N. Van Atter, and which lot was sold on or about the 12th day of September, A. D. 1850, and deeded by said Swain and his wife to Henry R. Holland, reference being had to said deed will more fully show, containing twelve (12) square rods of land, with its appurtenances.

Also, thirteenth, a certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a stake standing on the south meandering line of the Paw Paw river, as surveyed by the United States, and forty (40) feet east of the center of said Main street; thence south 6½ degrees, west three (3) chains and thirty-three and a third (33⅓) links; thence south 83½ degrees, east one (1) chain and fifty (50) links; thence north 6½ degrees, east parellel with the line of said Main street to the south meandering line of said Paw Paw river; thence northwesterly along said south meandering line of said Paw Paw river to said stake, the place of beginning, containing one half of an acre of land, with its rights and appurtenances.

Also, fourteenth, a certain piece or parcel of land, excepted and reserved from this sale, known, bounded, and described as follows, viz: beginning at a point seventy-five (75) links north (or very near it) of the center of said public highway or road aforesaid, leading from Paw Paw to St. Joseph, as surveyed by said Jehiel Enos, and recorded as aforesaid, which point is the southwest corner post of ground cleaned off and fenced for a burying ground and is about eleven (11) chains and eighty (80) links west of the east line of
483 said southwest fractional quarter of said sec. No. twenty-three (23;) thence north five (5) degrees, west five (5) chains and seventy-one (71) links; thence north eighty-four (84) degrees and fifty (50) minutes, east four (4) chains; thence south five (5) degrees, east (4) chains and twenty-nine (29) links, to a point seventy-five (75) links from the center of said highway or road last aforesaid; thence south seventy (70) degrees, west along parallel with the center of said road or highway last aforesaid to said point, the place of beginning, containing two (2) acres of land, with the rights and appurtenances thereto belonging.

And it is understood and agreed by the parties to this agreement, that school district No. two, (2,) in the township of Watervliet aforesaid, which owns the school house upon said premises, is to have the use of the ground fenced out around the same, of one (1) square chain, so long as said district desires and may occupy said school house for school purposes, or may move the same; then this reserve for the use of said ground to be fully complete and ended.

Also, it is understood as aforesaid, and agreed, that a small building, owned and occupied by James W. Redding for a variety store,

situated on premises included in this sale, is excepted and reserved from this sale, and may stand where it does while convenient to the owners of the land it stands upon, at a reasonable rent, or to be removed on giving the owner of the building reasonable notice to do so, without any let or hindrance whatever.

Also, it is understood as aforesaid, and agreed, that the use and occupancy of the house, out-house, and fixtures, and premises enclosed therewith, where said Swain now resides with his mother, brother, and sister, is excepted and reserved by said Swain for his benefit for one year from date hereof; then to be fully complete and ended, and surrendered with the premises above conveyed.

And also, the use and occupancy of the shop building, and fixtures connected with the same, where Russell Swain, a deaf mute, now occupies, together with the use of the water as now used, or
484 in a similar way, so long as said Russel Swain chooses or desires; and shall occupy the same free of rent, let, or unnecessary hindrance, otherwise than if in the way of other important improvements, may be removed sufficiently to be reasonably out of the way, and where he can have the same use and privileges as before, and when said Russel Swain is done with it, or abandons it not to occupy any more, then this reserve is to terminate and be fully completed and ended.

II. The parties of the second part, for themselves, their heirs, executors, administrators, and assigns, agree to pay to the party of the first part, for the lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging, the just and full sum of fifty thousand dollars, ($50,000,) in the manner following, to wit: ten thousand dollars ($10,000) on the delivery of this contract, or within ninety (90) days from the date hereof, with interest, and the balance of forty thousand dollars ($40,000) in eight equal annual *annual* installments of five thousand dollars ($5,000) each, with lawful interest from the date hereof, to be paid annually on the whole sum remaining due or unpaid in each year, at the rate of seven (7) per centum. And the said party of the second shall part also pay and discharge all taxes from this date upon said premises hereby sold.

III. It is agreed and understood by the parties to this agreement, that after the payment of the said ten thousand dollars, ($10,000 00,) then, or within ninety days thereafter, said party of the first part agrees to execute, or cause to be executed, to the parties of the second part, their heirs or assigns, a good and sufficient warranty deed for the said lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging, upon and at the same time the said parties of the second part shall execute to the said party of the first part good and satisfactory security upon other property for the amount of six thousand six hundred and sixty-six and two-third dollars, ($6,666⅔,) and also their bond, and a good and sufficient mortgage upon the lands above described and not reserved from this sale, with the rights, privileges, and appurtenances thereunto belonging, conditional to pay to said party of the first part the said forty thousand dollars, ($40,000,) as

above stated, in eight equal annual installments of five thousand dollars ($5,000) each, and interest as above stated; and also for any amount at any time remaining over due and unpaid, the same shall be considered as money loaned and bearing interest thereon at the rate of ten (10) per centum per annum, which interest shall also be paid annually.

It is also agreed by the parties as aforesaid, that the said parties of the second part shall keep an insurance in some safe insurance company upon the insurable property upon said premises for at least one third of their value, for the benefit and security of said party of the first part, to be paid over in case of losses to the said party of the first part as payment on the purchase money; that there shall be no unreasonable strip or waste upon the premises faster than the purchase money is paid, so as to in anywise impair the securities.

Said party of the first part ~~not~~ having a tax deed of the other undivided one-half of the NE. ¼ of sec. 23, in township three south, of range seventeen west, agrees to make and execute to said parties of the second part, at the same time of giving the warranty deed of the other lands, a quit-claim deed of the same, which land shall also be included in their mortgage above stated, and also to quit claim to said parties of the second part all his right of flowage upon any lands he may have in consequence of raising the dam on the Paw Paw river, on said section No. 23 aforesaid; and also all his rights, by acts of the legislature of the State of Michigan, for constructing and maintaining said dam—all which grants shall be included also in the mortgage aforesaid, to be executed by said parties of the second part to said party of the first part for security of the purchase money. Said Swain is to have all reasonable time and privilege to take care of and dispose of all his personal property on said premises; and said Medberry and Aldrich to have possession of the mills and the new store at once, and the other possession as soon as convenient to vacate them reasonably.

485

In testimony whereof, the parties have hereunto set their hands, the day year first above.

ISAAC N. SWAIN.
JOHN W. MEDBERRY.
JAMES F. ALDRICH.

ADDISON MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Received, Watervliet, Sept. 30th, 1854, to apply on this contract, of James F. Aldrich, three thousand three hundred and eighty dollars, for which I have given him a receipt; also, of John W. Medbury, also to apply on this contract, three thousand three hundred and thirty-three and 33-100 dollars, which I have given a receipt for—making in all six thousand seven hundred and thirteen 33-100 dollars, ($6,713 33-100.)

ISAAC N. SWAIN.

Exhibit A. No. 2.

Whereas, in the great hurry and confusion of drawing up and completing, as was supposed, the within and foregoing contract, Mr. Aldrich wishing to leave hurriedly for the purpose of taking the cars for home on Saturday evening, Sept. 30th, 1854, important items of the agreement were left out of said contract, which of right ought to have been in:

Therefore, be it known and added to the within and foregoing contract, that it was agreed, and is hereby agreed, by the parties to said contract, that in consideration for the building of the new store on said premises, and for the materials now on hand for it, included in the items and account rendered, and work and labor done for that store, there was to have been paid by the said parties of the second part to said party of the first part the further sum of two
486 thousand and four hundred dollars, in two annual installments of one and two years from that date, with interest.

It is therefore agreed by the undersigned parties to said contract, that said amount of two thousand and four hundred dollars shall be added to the amount of the bond and mortgage within mentioned, conditioned to be paid as above stated; and it is also further agreed, that said parties of the second part are to have the saw logs now on hand belonging to said party of the first part, at what they have cost him for those he has purchased in the log, as per accounts of purchase, and for all others on hand for and at the rate of three dollars per thousand feet, as usually measured; for all which said logs, said parties of the second part agree to pay said party of the first part, in six months from this date, with interest.

Dated at Watervleit, October 3d, 1854.

ISAAC N. SWAIN.
J. W. MEDBERY,
J. F. ALDRICH,
By J. W. MEDBERY.

Duplicate.

Rec'd on the foregoing contract, December 28th, 1854, three thousand and three hundred and forty-four and 18-100 dollars to apply on the first payment, ($3,344 18.)

ISAAC N. SWAIN.
A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Exhibit B.

487 Bond.

Know all men by these presents, that ~~one~~ John W. Medbery, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the State of Illinois, are jointly and severally held and firmly bound unto Isaac N. Swain, of the county

Berrien, and State of Michigan, in the sum of eighty-four thousand and eight hundred dollars, lawful money of the United States, to be paid to the said Isaac N. Swain, his heirs, executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated this fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-five.

The conditions of the above obligation are such, that if the above-bounden John W. Medbery and James F. Aldrich, or either of them, their or either of their heirs, executors, or administrators, shall well and truly pay, or cause to be paid unto the above-named Isaac N. Swain, his heirs, executors, administrators, or assigns, the just and full sum of forty-two thousand and four hundred dollars, ($42,400 00) and interest annually, to be computed from the 28th day of September, 1854, and at the rate of 7 pr. ct. per annum on all sums before due; and by stipulation it is agreed by the parties to these presents, that the interest shall be at the rate of ten per cent. per annum on all sums after being due, and until payment thereof be made, all which shall be paid in way, manner, and according to the terms following, to wit:

($6,200 00) six thousand and two hundred dollars, and interest as aforesaid on the whole unpaid, on the twenty-eighth day of September, one thousand eight hundred and fifty-five, and ($6,200 00) six thousand and two hundred dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eigth day of September, one thousand eight hundred and fifty-six, and ($5,000 00) five thousand, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and fifty-seven, and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September,
488 one thousand eight hundred fifty-eight, and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred fifty-nine, and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and sixty, and ($5,000,00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and sixty-one, and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and sixty-two, and shall and do well and truly, and duly pay and discharge, or cause to be paid and discharged, all taxes from and after the twenty-eighth day of September, one thousand eight hundred and fifty-four, on premises described in a certain mortgage indenture bearing even date herewith, executed by said John W. Medbery and James F. Aldrich, and their wives, to said Isaac N. Swain, and shall and do well, and truly comply with the insurance clause contained in said mortgage indenture aforesaid, and well and truly shall

not and do not commit, allow, or suffer, any strip or waste to or upon said premises described in said mortgage indenture, so as to in any way impair the securities intended to be effected by said mortgage indenture, then the above obligation to be void, otherwise to be and remain in full force and virtue.

JOHN W. MEDBERY. [SEAL.]
JAMES F. ALDRICH. [SEAL.]

Sealed and delivered in the presence of—
WILLIAM WALLACE STEWART,
A. LANDON, JR.

STATE OF ILLINOIS, *Cook county, ss:*

Be it remembered, that on this fourteenth day of April, A. D. 1855, before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Michigan to take the acknowledgement and proofs of the execution of deeds, or other conveyances or leases, and of any contract, letters of attorney, or other writings, under seal or not, administer oaths, and take and certify
489 depositions to be used and recorded in the said State of Michigan, appeared John W. Medbery and James F. Aldrich, described in, and who executed the within and foregoing instrument of writing between them as one of the parties thereto, and Isaac N. Swain, who is the other party thereto, and the said first parties acknowledged that they executed the said instrument freely for the purpose therein stated; and I further certify that I know that the persons who made the said acknowledgement are the identical persons described in, and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city of Chicago, the day and year first above written.

[SEAL.] WILLIAM WALLACE STEWART,
Commissioner of Deeds.

Upon the said bonds are the following endorsements:

$1,000 00. Received, Dec. 15th, 1858, of Ætna Insurance Co. for grist mill, (burned Sept. 23d, 1858,) the sum of one thousand dollars, to apply on payment due Sept. 28th, 1859, as per insurance clause in the mortgage.

Received, Dec. 2d, 1859, of William Aldrich, ninety dollars to apply on within. $90 00.

$1,742 57. Rec'd, September 28th, 1855, on the within, seventeen hundred and forty-two and 57-100 dollars, to apply on the first instalment within mentioned.

ISAAC N. SWAIN,
Mortgagee.

$2,944 36. Rec'd Feb. 8th, 1856, on the within, from Mr. James F. Aldrich, George Smith's dr't, and premium, and cash, to the amount of twenty-nine hundred and forty-four and 36-100 dollars, to apply on first payment.

ISAAC N. SWAIN.

$4,736 60-100. Rec'd Feb. 8th, 1856, on the within, from Mr. John W. Medbery, draft on New York for forty-seven hundred one and 37-100 dollars, and premium of ¾ of one per cent. on the
490 same; making in all the amount of forty-seven hundred thirty-six and 60-100 dollars, to apply on first payment.

$14 43 Rec'd, also, as of Feb. 8, 1856, of J. F. Aldrich, fourteen and 43-100 dollars, being the balance due on first instalment within.

ISAAC N. SWAIN.

$1,000 00. Rec'd October 1st, 1856, on the within, from James F. Aldrich, his check for one thousand dollars.

SAAC N. SWAIN.

$1,000 00. Rec'd October 9, 1856, on the within, from James F. Aldrich, one thousand dollars, and gave him rec't for the same.

I. N. SWAIN.

$6,801 30. Rec'd, Nov. 1st, 1856, on the within, from James F. Aldrich, six thousand, eight hundred and one, and 30-100 dollars, being the balance due on the second instalment within mentioned.

ISAAC N. SWAIN.

Received, Nov. 27th, 1858, on the within, fourteen thousand six hundred and 43-100 dollars, one-half of which of Joseph Carr, and the other half of William Aldrich, which pays the interest on the whole sum unpaid to the 28th Sept., 1858, and the third and fourth instalments and their interest to this date.

I. N. SWAIN.

Rec'd, as Nov. 19th, 1859, of Joseph Carr, on this bond, two thousand and twenty dollars, ($2,020 00.)

Rec'd, Aug. 27th, 1860, of Carr & Aldrich, $400; also, Sept. 3d, 1860, $776 73; also, Sept. 17th, 1860, $261 17.

Rec'd, June 8th, 1861, of V. Beckerford, I. L. Shank, $403 00.

A. MANDELL,
Commissioner.

ISAAC N. SWAIN.

491 *Exhibit C.*

This indenture, made the fourteenth day of April, in the year one thousand eight hundred and fifty-five, between John W. Medbery and Mary R. Medbury, his wife, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich and Eleanor C. Aldrich, his wife, of the city of Chicago, in the State of Illinois, of the first part, and Isaac N. Swain, of Watervliet, in the county of Berrien, and State of Michigan, of the second part: Witnesseth, That the said parties of the first part, for and in consideration of the sum of forty-two

thousand and four hundred dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, released, enfeoffed and confirmed, and by these presents do grant, bargain, sell, release, enfeoff and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces or parcels of land, rights, privileges and franchises situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, to wit:

(Here follows descriptions of lands, &c.) See deed page.

(Always excepting reserving therefrom all those certain fourteen pieces or parcels of land, containing in the aggregate eleven 21½-100 acres, together with their appurtenances, and all those certain rights and privileges excepted and reserved in that certain deed and conveyance of above-named premises, executed by said party of the second part and his wife, Vallonia J. Swain, to said parties of the first part, bearing date the 27th day of March, A. D. 1855. Reference being had to said deed and conveyance will more fully show and determine.)

Being the same premises conveyed or caused to be conveyed to said parties of the first part by said party of the second part and his wife, and these presents are given to secure the payment of part of the consideration money of the said premises, together with all and singular the tenements, &c., &c. To have and to hold the above bargained premises, with the appurtenances, to the said party of the second part, his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever. Provided always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, &c., shall and do well and truly pay, or cause to be paid, to the said party of the second part, his heirs, &c., the just and full sum of $42,400, with interest, &c.; (here follows conditions as to time and amounts of payments,) and shall and do well and truly pay or cause to be paid and discharged all taxes from and after the 28th day of September, 1854, upon said premises above described; and shall, and and do well truly comply with the insurance clauses hereinafter stated; and well and truly shall not, nor do not, commit, allow or suffer any strip or waste upon said premises so as to in anywise impair the securities hereby intended to be effected, according to the condition of a certain obligatory bond bearing even date herewith, executed by said John W. Medbery and James F. Aldrich, jointly and severally, of the said parties of the first to the said party of the second part, to which these presents are a collateral security; then these presents
492 and the said obligatory bond shall cease and be null and void.

But in case of the non-payment of the said sum of $42,400 00, or of the interest thereof, or any part thereof at the above time limited for the payment thereof; or non-payment of the taxes as above stated, or non-fulfillment of the insurance clause, or in case of strip or waste on said premises so as to in any wise impair the securities,

then, and in such case, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, and the said parties of the first part do hereby empower and authorize the said party of the second part, his heirs, executors, administrators, or assigns to grant, bargain, sell, release and convey the said premises, with the appurtenances, at public auction or vendue; and on such sale to make and execute to the purchaser or purchasers, his, her, or their heirs and assigns forever, good, ample and sufficient deed or deeds of conveyance in the law, pursuant to the statute in such case made and provided, rendering the surplus moneys (if any there should be) to the said parties of the first part, their heirs, executors, or administrators, after deducting the principal and interest moneys due as aforesaid, and the costs and charges of such vendue and sale aforesaid, and the cost and charges consequent upon the following insurance clause, as agreed upon by the parties to these presents, to wit:

And it is also agreed by and between the parties to these presents, that the parties of the first part shall, and will well and truly keep the buildings erected, and the large saw mill to be erected upon the premises above described, insured in some safely reputed fire insurance company or companies against loss by fire, and assign the policy or policies and certificate or certificates thereof to the said party of the second part, his heirs, executors, administrators or assigns. And all moneys received by said party of the second part, his heirs, executors, administrators or assigns, on account of such insurance in case of loss or losses, shall be endorsed on this indenture to apply on any moneys then due, or next to become due thereon; and in default thereof, it shall be lawful for said party of the second part, his heirs, executors, administrators or assigns, to effect the said insurance, and the premium or premiums paid for effecting the same, and the costs and charges, shall be a lien on the said mortgaged premises, added to the amount of said bond or obligation and secured by these presents, which shall be payable for each preceding current year on the twenty-eighth day of September, in each and every year, until all obligations herein be fully paid.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

493

JOHN W. MEDBERY. [SEAL.]
MARY R. MEDBERY. [SEAL.]
JAMES F. ALDRICH. [SEAL.]
ELEANOR C. ALDRICH. [SEAL.]

Signed, sealed and delivered in presence of—
WILLIAM WALLACE STEWART,
A. LANDER, JR.

STATE OF ILLINOIS, *Cook county, ss:*

Be it remembered, that on this fourteenth day of April, A. D. 1855, before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Michigan, to take the acknowledgment and proofs of the execution of deeds, or other con-

veyances, or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths and take and certify depositions to be used and recorded in the said State of Michigan, appeared John W. Medbery and Mary R., his wife, and James F. Aldrich, and Eleanor C., his wife, described in, and who executed the within and foregoing instrument of writing between them, as one of the parties thereto, and Isaac N. Swain, who is the other party thereto, and the said first parties acknowledged that they executed the said instrument freely, for the purposes therein stated. And the said Mary R. Medbery and Eleanor C. Aldrich, wives of said Medbery and Aldrich, on being made acquainted with the contents thereof by me, and on a private examination, apart from their husbands, acknowledged that they executed the said instrument of writing freely, and without any fear or compulsion of their said husbands, or any other person. And I further certify, that I know that the persons who made the said acknowledgement are the identical persons described in, and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand, and affixed my official seal, at my office in the city of Chicago, the day and year first above written.

[SEAL.] WM. WALLACE STEWART,
Commissioner of Deeds.

$1,000 00. Received December 15th, 1858, of Ætna Insurance Co., for grist mill, (burned Sept. 23d, 1858,) the sum of one
494 thousand dollars, to apply on payment due Sept. 28th, 1859, as per above insurance clause, and which amount is also this day endorsed on the bond to which this mortgage refers.

ISAAC N. SWAIN, *Mortgagee.*

REGISTER'S OFFICE,
Berrien Co., Mich.

Received for record, April 19th, 1855, at 4 hours, p. m., and recorded in book G, of mortgages on pages 168, 169, 170, 171, and 172.

WARREN CHAPMAN, *Register.*

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

495 "*Exhibit D.*"

This indenture, made the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, between John W. Medbery and Mary R. Medbery, his wife, of the city of Milwaukee, in the State of Wisconsin, party of the first part, and Isaac N. Swain, of Berrien county, in the State of Michigan, party of the second part. Whereas, the said party of the first part, with James F. Aldrich, is justly indebted to the said party of the second part in the sum of forty-two thousand and four hundred dollars, and interest from the

28th day of September, 1854, agreed and secured to be paid by a certain bond and mortgage executed by said parties of the first part, and said James F. Aldrich, and his wife, to said party of the second part, bearing even date herewith, to secure a part of the purchase money for the premises described in said mortgage. Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said bond and mortgage above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey, unto the said party of the second part, his heirs and assigns forever, all of the undivided one-third part of all those certain pieces, parcels or lots of land situate, lying, and being in the city of Milwaukee aforesaid, and known and described as being lots numbered seven, [7] eight, [8] nine [9] and ten, [10] in block number thirty-two, [32] in the second [2] ward of said city of Milwaukee aforesaid, and upon which lots is situated and being the flouring mill known as the Empire mills, owned and occupied by said John W. Medbery and Martin B. Medbery. And the said parties of the first part hereby covenants to and with said party of the second part that said premises above described are free and clear of all encumberances previous to this indenture. To have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining. And also, all the estate, interest and claim whatsoever, in law as well as in equity, which the party of the first part have in and to the premises hereby conveyed unto said party of the second part, his heirs and assigns, and to their only proper use, benefit and behoof. Provided always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators shall well and truly pay, or cause to be paid, to the party of the second party, his heirs, executors, administrators or assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the above-mentioned bond and mortgage executed by said parties of the first part, and said James F. Aldrich and his wife, to said party of the second part, bearing even date herewith, &c., as aforesaid, according to the true intent and meaning thereof, then, and in that case, these presents, and every thing herein expressed, shall be absolutely null and void.

496 In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN W. MEDBERY. [SEAL.]
MARY R. MEDBERY. [SEAL.]

Sealed & delivered in the presence of—
WM. WALLACE STEWART.
A. LANDER, Jr.

STATE OF ILLINOIS, *Cook county, ss:*

Be it remembered, that on this fourteenth day of April, A. D. 1855, before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin, to take the acknowledgement and proofs of the execution of deeds, or other conveyances, or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used and recorded in the said State of Wisconsin, appeared John W. Medbery, and Mary R., his wife, described in, and who executed the within and foregoing instrument of writing, between them as one of the parties thereto, and Isaac N. Swain, who is the other party thereto, and the said Medbery and wife, acknowledged that they executed the said instrument freely, for the purposes therein stated. And the said Mary R. Medbery, wife of J. W. Medbery, being made acquainted with the contents thereof by me, and on a private examination, apart from her husband, acknowledged that she executed the said instrument of writing freely, and without any fear or compulsion of her said husband, or any other person. And I further certify, that I know that the persons who made the said acknowledgement are the identical persons described in and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand, and affixed my official seal, at my office, in the city of Chicago, the day and year first above written.

[SEAL.] WM. WALLACE STEWART,
Commissioner of Deeds.

497 It is hereby stipulated and agreed by the party of the second part, within named, that if within two years from this date, the large saw mill, fifty by one hundred and fifty feet in size, shall be properly built and completed, upon the foundation at Watervliet, commenced last fall by driving piles, which is on the premises described in the said mortgage mentioned as being executed by said John W. Medbery and James F. Aldrich, and their wives, to accept in place of the within mortgage, security in proper fire insurance policy or policies on said large saw mill, and thereupon to discharge the within mortgage. To which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself, his heirs, executors, administrators, and assigns.

Dated April 14th, 1855.

ISAAC N. SWAIN. [SEAL.]

In presence of—
WM. WALLACE STEWART.
A. LANDER, Jr.

STATE OF ILLINOIS, *Cook county, ss:*

Be it remembered, that on this fourteenth day of April, A. D. 1855, before the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin, to take the ac-

knowledgement and proofs of the execution of deeds, or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used and recorded in the said State of Wisconsin, appeared Isaac N. Swain, who is described in, and who executed the within and foregoing instrument of writing, between him, as one of the parties thereto, and John W. Medbery and Mary R., his wife, the other party thereto, and the said Isaac N. Swain acknowledged that he executed the said instrument freely, for the purposes therein stated. And I further certify, that I know that the person who made the said acknowledgement is the identical person described in
498 and who executed the said instrument of writing.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the city of Chicago, the day and year first above written.

[SEAL.] WM. WALLACE STEWART,
Commissioner of Deeds.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

499 *Exhibit E.*

Mutual Fire Insurance Company, of Jackson, Michigan.

This policy of insurance witnesseth: That for and in consideration of one hundred dollars, cash premium in hand paid, (and three premium notes as follows: two each, three hundred, one, four hundred, in all $1,000 dollars,) received and hereby acknowledged, the Jackson County Mutual Fire Insurance Company do insure Medberry & Aldrich, of Watervliet, in the county of Berrien, and State of Michigan, against loss or damage by fire, to the amount of six thousand dollars, on the following property as described in application and survey No. 10,657, which are hereby made part of this policy, viz:

On their grist mill, two thousand dollars; on their saw mill, two thousand dollars; and on their store, two thousand dollars, all of which are situated in Watervliet, Berrien co., State of Michigan.

And the said company do hereby promise and agree to make good unto the said insured, their executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified, from the eighth day of February, one thousand eight hundred and fifty-five, (at twelve o'clock at noon,) unto the eighth day of Feb'y, one thousand eight hundred and sixty, (at twelve o'clock at noon,) the said loss or damage to be estimated according to the true and actual value of the property at the time the same shall happen, and to be paid within three months after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy; but in case of total loss, the amount of premium notes, if unpaid, shall be first deducted.

Provided always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or by any earthquake or hurricane; and provided further, that in case the assured shall have already any other insurance against loss by fire on
500 the property hereby insured not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And the assured hereby covenant and agree that the representations given in the application for this insurance, and also as set forth in the above writing, is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured, and liens thereon, so far as known to the assured; and that if any fact or circumstance shall not have been truly represented, or if the said assured, or their assigns, shall hereafter make any other insurance on the same property, or suffer the same to be incumbered, and shall not give immediate notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property; and whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town, or other corporation, or to prosecute therefor at the charge and for account of this company, if requested.

And it is agreed and declared to be the true intent of the parties hereto, that in case the above-mentioned buildings shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, or extra hazardous, or specially hazardous, in the memorandum annexed to this policy, or otherwise, or for the purpose of storing, keeping, or vending therein any of the articles, goods, or merchandise, in the conditions thereof denominated hazardous, or extra hazardous, or specially hazardous, or other than as above expressed in writing, unless herein otherwise specially provided for, or herein-
501 after agreed to by this company in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to or to cover any book of account, written securities, deeds, or other evidences of titles to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the conditions hereto annexed, which are hereby

made part of this policy, and are to be used and resorted to in order to explain the rights and obligations of the parties hereto.

In witness whereof, the president of said company hath hereunto subscribed his name, and caused the same to be attested by their secretary, in Jackson, Michigan, the 8th day of Feb'y, one thousand eight hundred and fifty-five.

[SEAL.] I. E. BEEBE, *President.*

M. E. DYER, *Secretary.*

The Jackson County Mutual Fire Insurance Company, of Jackson, Michigan.

In all cases where a policy is to be assigned, (except when so stated in the original application,) the assignor must furnish the assignment, or a true copy of the same, (with fifty cents recording fees,) to the secretary, to be approved by a director and entered on the register, and if the policy is founded on note, the assignee should sign the same, or give a new premium note.

☞ All communications should be directed to the secretary, (post paid,) and if in reference to a policy, the number should be given. ☜

Conditions of insurance.

1. Applications for insurance on property must be in writing, and specify the construction and material of the building to be in-
502 sured, or containing the property to be insured; the interest and title, and extent thereof, which applicant has in such property; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction or materials; whether any manufactory is carried on within or about it; and in case of goods or merchandize, whether or not they are of the description denominated and classified hereafter; and in case of household goods, wearing apparel, liquors, machinery, fixed or movable, or fixtures of any kind, a specification should be made of each in such application.

If any person insuring any building or goods in this company shall make any misrepresentation or concealment, or if, after the insurance, effected either by an original policy, or by the renewal thereof, the risk shall be increased by any means whatsoever, or if such buildings or premises shall be used or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect, unless the consent of the company in writing is obtained to continue such insurance.

If during the insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise; or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured, or his representative, of their intention to do so; in which case the company shall refund a rateable propor

tion of the premium. The company shall, in case of loss on buildings, be liable for no more than two-thirds the actual cash value of such buildings at the time of such loss.

2. This company shall not be liable for any damage caused by fire originating from depositing ashes or embers in wooden vessels, nor for loss in consequence of the explosion of a steam boiler, or of the burning of gunpowder, spirit gas, camphene or burning fluid, which said last mentioned articles are hereby expressly prohibited from being deposited, stored, kept, used, or permitted to be or remain in any building insured or containing any goods whatever in-
503 sured by this policy, unless special consent is given thereto in writing in this policy.

3. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

4. Property held in trust or on commission must be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein, and the extent thereof severally. Goods on storage must be separately and specifically insured as such. All interests insured which are not absolute, must be truly set forth in the application and policy, both as to extent and character; otherwise the policy shall be void and of no effect. A mortgagee may insure his mortgage interest during the term of such lien, not exceeding in amount two-thirds the cash value of the property encumbered; and in the event of loss and adjustment of the same by this company, the holder of such incumbrance shall, if requested, convey to such persons as this company may designate, his interest in such mortgage, or other primary security.

5. Notice of all previous insurances upon any property insured by this company, shall be given to them, and endorsed on this policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon; otherwise the policy subscribed by this company shall be of no effect. And in case of subsequent insurance on property insured by this company, notice thereof in writing, subscribed by the insured, must be given to them with all due diligence, to the end that subsequent insurance may be endorsed on the policy subscribed by this company, or otherwise acknowledged in writing; in default whereof, such policy shall thenceforth cease and be of no effect. And in all cases of insurance this company shall be liable for such rateable proportion of the loss or damage happening to the subject insured as the amount insured by this company shall bear to the whole amount insured thereon, without reference to the dates of the different policies.

504 6. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property; but in no event shall the company be liable for property purloined or stolen, whether before, after, or during the progress o
r fire. And it is mutually understood that there can be no abandon

ment to the insurers of the property insured; and in all cases of reinsurance this company shall be liable only for such rateable proportion of the loss or damage happening to the subject insured, and which the party effecting such reinsurance shall become liable to pay, as the amount of such reinsurance by this company shall bear to the whole amount insured thereon, exclusive of such reinsurance.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of this company, expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, or of any claim by virtue thereof, whether before or after loss, the liability of the company, in virtue of such policy, shall cease and be void.

8. Jewels, plate, paintings, statuary, sculptures, and curiosities are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

9. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and within thirty days thereafter deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation; and also, if required by the company, produce their books of account and other proper vouchers, and permit extracts and copies to be made. They shall also declare, on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein, and the extent thereof; in what general manner (as to trade, manufactory, merchandise, or otherwise) the buildings insured, or containing the subject insured, and
505 several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe; and also, in case of personal property, that such property for which claim is made, was either destroyed or damaged in consequence of fire, and to their knowledge and belief was not purloined or otherwise disposed of either before or during such fire. They shall also procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers,) that they have made due inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and are acquainted with the character and circumstances of the person or persons insured, and do know or verily believe that he, she, or they really and by misfortune, and without fraud or evil practice, hath, or have sustained, by such fire, loss and damage to the amount therein mentioned; and shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examined, if

required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, and shall a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, and the expense to be paid by the insured.

A copy of the written portion of policy to be given in the
506 affidavit of the claimant. In every case of loss or damage, whether total or partial, sustained upon any property covered by this policy, either real or personal, an appraisement of the same shall be made by two or three competent persons who are not in any way interested in the same, nor in any degree connected with the insured, to be mutually appointed by the insured and the company, or their agent. The report of such appraisement shall be in writing, under oath, and must form part of the preliminary proofs aforesaid. All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on this policy.

10. In case of any loss on, or damage to, the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind and equal value, or pay to the assured the actual cash value of the property lost or damaged at the time when such fire shall occur, and to rebuild or to repair the buildings within a reasonable time, giving notice of their intention to do so within thirty days after having received the preliminary proofs of loss required by the nintb article of these conditions.

11. Payment of losses shall be made in ninety days after notice, proof, and adjustment thereof; and in case differences shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award, in writing, shall be binding on the parties.

12. Insurances once made, may be continued for such further term as may be agreed, such agreement to be in writing, signed by the officers of the company, and, when so continued, shall be considered under the original representations in so far as it may not be varied by a new representation in writing.

13. In any case where the consent of this company is granted to a transfer of a policy as collateral security, then, in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, if required, shall make the requisite proofs of loss in their own name, as herein specified, and fully comply with all the conditions and requisitions as herein contained,

as much so as if the policy had never been assigned; other-
507 wise this policy shall be void, and of no force or effect whatever, and all liability on the part of this company shall cease.

14. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they fail to do so, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect.

15. When property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers pro rata, in the proportion that the whole sum insured bears to the whole property insured, of which proof, in the case of losses, shall be made by the claimant.

16. In all cases of application for insurance in this company, the applicant shall state the true value of the property, and also the amount of incumbrance on the same; and should thereafterwards an incumbrance fall, or be executed upon the property insured, and he shall neglect or fail to give notice thereof to the company, and have the same acknowledged in writing, then in that case this policy shall be void. The interest of the assured in this policy, or in the property insured thereby, is not assignable, unless by consent of the company in writing; and in case of any transfer, or termination of such interest, or any part thereof, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect.

17. This policy may be surrendered at any time before loss, by the payment of all assessments made, and of a sum in addition thereto, equal to ten per cent. of the original premium note; and on such surrender and payment, the premium note will be returned.

18. The directors will make such assessment on the premium note as may be necessary to pay losses and expenses of assessment and collections; and in case of partial loss, may also deduct from the same, at the time of adjustment or payment, such portions of the premium note as the directors may deem just and proper.

19. In case any building, goods, or other property insured by said company shall be burned or damaged, the directors may de-
508 mand an additional security for the payment of the deposite note given for the insurance of said property, by the insured depositing with the treasurer the amount that shall remain unpaid on said note, which deposite shall consist of a part of the insurance money due said insured, to be retained by the secretary until the expiration of the term of his policy, when the insured shall have the right to demand and receive such part of said sum deposited as shall not be required for losses and assessments, and it shall be the duty of the secretary to pay the same after the expiration of his said policy.

20. "If any person or persons who shall become members of said company by effecting insurance therein after the passage of this act, their heirs, executors, administrators, or assigns shall neglect or refuse the payment of any assessment or assessments duly ordered by the directors of said company, for the space of thirty (30) days after

notice that the same have become due and payable, the party so in default shall be excluded and debarred from, and shall loose all benefit and advantage of his, her, or their insurance or insurances, respectively, for and during the term of such default or non-payment, and, notwithstanding, shall be liable to pay all assessments that shall be made during the continuance of his, her, or their policy of insurance, pursuant to the provisions of the act to which this is an amendment."—Amended charter, sec. 2.

Classes of hazards and rates of insurance.

Goods not hazardous.—Such as are usually kept in a dry goods store; also, coffee, flour, fur, household furniture, indigo, potash, rice, sugar, spices, threshed grain, and other articles not combustible.

Goods, trades, and occupations deemed hazardous.—Hardware, looking glasses in boxes, cutlery, wine in casks, wine in glass, (in packages,) dry goods, window or plate glass in boxes, crates, or casks, flour, fire crackers in packages, flax in bales, grocers, hat finishers, (without fire heat except for heating their irons,) hay pressed in bundles, hemp in bales, indigo, India rubber goods,
Manilla grass in bales, oils, paints ground in oil, paper hang
509 ings, paper in reams, potash, rags in packages, rice, sail makers, spices, spirituous liquors, sulphur, segars, sugar makers, tallow, taverns, teas, victualling shops, wine in casks, wine dealers stock, (not including wine in glass unpacked,) wine in glass, (in packages.)

Goods, trades, and occupations deemed extra hazardous.—Acids, inflammable, apothecaries, those who make up prescriptions only; alcohol, basket bleachers or makers, basket seller's stock, blacksmiths', bookseller's stock, bottling cellars, brushmaker's stock, cabinet maker's stock, china, or earthen or glass ware, or looking glasses unpacked, and buildings in which the same are packed or unpacked, chocolate makers, colermen's stock, copperplate printers, coppersmiths, cotton brokers, with samples, cords, tassels, and fringes, essential oils, flax unpacked, fur dressers, fur or wool hat finishers, with use of fire heat to steam and black the bodies; gunmakers or smiths; hemp unpacked, jeweller's stock, lamp manufactories, lamp seller's stock, liquor in glass unpacked, lithographers, milliner's stock, morocco manufacturers, needles and fish hooks, optical, mathematical, and musical instrument makers, and perfumer's stock, oils essential, painter's stock, pictures and prints, pitch, plumbers, pewterers, pocket-book makers, printers of newspapers, of books, and jobbing, or engravings, pocket-book maker's stock, porter houses, silver smiths' or stationer's stocks, spirits of turpentine, tanneries without heaters, tin or sheet iron workers, toy shop keeper's stock, thread and needle stocks, turpentine, upholster manufacturers, varnish, watch maker's stock and tools, window or plate glass unpacked, wooden-ware sellers, wine in glass unpacked.

Goods, trades, and occupations deemed specially hazardous.—Bakers,

blind makers, bookbinders, brimstone works, brass founders, cabinet makers, candle makers, carpenters, chair makers, chemists, coach makers, comb makers, confectionary makers, corn kilns, cotton unpacked, carvers, coopers with fire heat, coppersmiths with forge, distillers, dyers, fire-work makers, flax mills, fringe makers, fulling mills, floor-cloth manufactories, gas makers or sellers, gun powder, glue manufactories, hay unpacked, ink makers, ivory black manufactories, India rubber manufactories, livery stables, match ma-
510 kers, metal mills, musical instrument makers, oil boiling houses, oil mills, packing buildings and yard, paper mills, perfumery makers, planing or grooving mills, phosphorus, picture-frame makers, rectifiers of liquors, rope makers, saw mills, silk hat manufactories, soap makers, spirit gas makers or sellers, steam engines in use, sugar refiners, snuff makers, tallow melters and chandlers, tanners with heaters, tar-boiling houses, theatres, and other places of public exhibition, turpentine distillers, turners of wood, tobacco manufactories, type and stereotype foundries, wool mills, wagon makers, saltpetre, and all occupations where shavings, or other combustible or inflammable substances are produced or used, or where steam power is applied.

Officers.—J. E. Beebe, president; J. B. Eaton, vice president; W. N. Buck, treasurer; M. E. Dyer, secretary

The Jackson Co. Mutual Fire Insurance Company hereby consent that the within policy be assigned to Isaac N. Swain, of Watervleit, subject, nevertheless, to all the conditions therein contained.

Jackson, April 16th, 1855.

M. E. DYER, *Secretary.*

For value received, we hereby transfer, assign, and set over unto Isaac N. Swain, of Watervleit, aforesaid, and his assigns, all our right, title, and interest in this policy of insurance. Witness our hands and seals, this fourteenth day of April, A. D. 1855.

MEDBERY & ALDRICH.

Signed, sealed, and delivered in presence of—

WM. WALLACE STEWART,
A. LANDER, Jr.

I hereby certify, that the risk on the saw mill mentioned and insured in the within policy, is not increased by the addition of another mill, in my opinion, and that there is less risk or danger of fire than when the insurance was effected.

Watervleit, April 11, 1856. M. A. DAILY, *Agent.*

The consent of the Jackson County Mutual Fire Insurance Co. is hereby given to the addition made to the within-described property up to date, providing the risk has not been increased by means of said addition.

Jackson, April 8th, 1856.

M. E. DYER, *Sec'y.*
A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Exhibit F.

511 Western Insurance Company.

By this policy of insurance, the Western Insurance Company, in consideration of nine dollars to them paid by the assured, hereinafter named, the receipt whereof is hereby acknowledged, do insure Medbery and Aldrich against loss or damage by fire, to the amount of three hundred dollars, on wooden building, one and ½ stories high, used as a boarding house, situate in the village of Watervleit, county of Berrien, Michigan, and occupied by Mr. Strothers, said building being on the north side of the Paw-paw river, in said village aforesaid, and on the west side of Main street, having a blacksmith shop within about fifteen feet of said building on the west side, and an old barn and shed attached on the east side, there being no other risks within eight rods of said building, said house owned by Medbery and Aldrich, subject to a mortgage upon the same, and also upon saw mill, grist mill, store, hotel, and four other wooden buildings, and one thousand acres of land, said mortgage running to Isaac N. Swain, in the sum of forty two thousand dollars, the amount yet due upon the purchase money, the same being of the value of $5,000.

And the said company do hereby promise and agree to make good, according to the conditions hereto annexed, unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the twelfth day of April, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) unto the twelfth day of April, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual value of the property at the time the same shall happen; and to be paid within ninety days after notice and proof thereof made by the assured, in conformity to
512 the conditions annexed to this policy: Provided always, and it is hereby declared, that this company shall not be liable to make good any loss by theft, or any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power: And provided further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, and not notified to this company and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And if any subsequent insurance should be made upon the property hereby insured which, with the sum or sums already insured, should, in the opinion of the said Western Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy, by paying to the assured the unexpired premium pro rata. And in case

of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared, to be the true intent and meaning of the parties hereto, that in case the above-mentioned Medbury & Co. shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on, or exercising therein, any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company, in writing, and added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease, and be of no force or effect. And it is moreover declared, that this insurance is not intended to apply to, or cover any books of account, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted, in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

This policy shall not be valid until countersigned by E. M. Plimpton, agent of said Western Insurance Company.

In witness whereof, the said Western Insurance Company have caused these presents to be signed by their president, and attested by their secretary, at their office in Olean, New York.

RUSSELL MARTIN,
President.

Attest: C. S. CARY, *Secretary.*

Countersigned at Niles, this 13th day of April, A. D. 1856.
E. M. PLIMPTON, *Agent.*

Conditions of insurance referred to in the body of the foregoing policy.

1. Goods not hazardous are such as are usually kept in dry goods stores, including coffee, flour, household furniture, and linen, indigo, rice, spices, sugars, teas, and all other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandise, are denominated hazardous, viz: Alcohol, basket sellers, brushmaker's stock, cabinet furniture, china, earthen or glass ware, or plate glass in boxes, crates or casks, copper-plate printers, cotton in bales, hat finishers, (without use of fire except for heating their

irons,) hardware and cutlery, jeweler's stock, liquor in glass unpacked, looking glasses in boxes, manilla grass in bales, paints ground in oil, paper hangings, porter houses, potash, pocket-book maker's stock, printers of newspapers, rags in packages, sail makers, ship
513 chandlers, spiritous liquors, cigar makers, stationer's stock, snuffmaker's stock and tools, wine in glass, in packages; window or plate glass in packages.

3. The following trades and occupations, goods, wares, and merchandise, are denominated extra hazardous, viz: Basket makers and straw bleachers, bookseller's stock, blacksmiths, builders, brass founders, china, earthen or glass ware, or looking glasses unpacked, cotton unpacked, coopers, coppersmiths, druggists and apothecaries, fur dressers, flax in bales, fringe makers, gun makers or smiths, grate makers, hay pressed in bundles, hemp in bales, ink makers, lamp manufacturers, lamp seller's stock, lithographers, milliner's stock, morocco manufacturers, optical and mathematical instrument makers, painter's stock, perfumer's stock, phosphorus, pictures and prints, printers of books and jobbing, plates, or plated-ware manufactories, pocket-book makers, plumbers and pewterers, silversmiths, stables, (private,) spirits of turpentine, stove manufactories, tobacco manufactories, toy-keeper's stock, type or stereotype manufacturers, varnish, window and plate glass unpacked.

Men.—Bakers, bark mills, blind makers, brewers, brimstone works, bookbinders, boat-builders, cabinet makers, carpenters, joiners, coopers, chair or coach maker's workshops, chemists, cotton mills, distilleries, dyers, forges, fences, flax mills, frame makers, furriers, fulling mills, gunpowder, grist mills, hat manufactories; houses building or repairing, ink or ivory black or lamp black manufactories, livery stables, lumber or mahogany yards, malt houses, metal and other mills, of all kinds, musical instrument makers, oil makers, oil boiling houses, oakum factories, pump and block makers, shops, paper mills, piazzas, and privies of wood, printers of books and jobbing, rope makers, sash makers, saw or snuff mills, ship builder's stock in the yard, ships or other vessels in port, or their cargoes, or when building or repairing, steam engines or boats, sugar re-
514 fineries, tallow melters or chandlers, tar-boiling houses, theatres, or other places of public exhibition, timber yards, turpentine manufactories, varnish makers, woollen mills, and generally all manufacturing establishments, and all trades requiring the use of fire heat, or steam power, not before enumerated, will be insured at special rates of premium.

4. Applications for insurance must specify the construction and material of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings and their construction and materials; whether any manufacturing is carried on within or about it; and in case of goods or merchandise, whether or not, they are of the description denominated hazardous, or extra hazardous, or included in the memorandum of special rates. And a false description, by the assured, of a building, or of its contents, or omitting

to make known any fact material to the risk, or an over valuation, shall render absolutely void a policy issuing upon such description or valuation. And if any survey, plan, or description of the property herein insured is given, whether it is or is not referred to in this policy, such survey, plan, or description shall be deemed, and taken to be a warranty on the part of the assured. If, after insurance is effected upon any building or goods in this office, either by the original policy, or by the renewal thereof, the risk shall be increased by any means whatever within the control of the assured; or if such building or premises shall, with the assent of the assured, be occupied in any way, so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, the insured shall give notice thereof, and it shall be optional with the company to terminate the insurance, after notice given to the assured or his representative of their intention to do so; in which case the company will refund a rateable portion of the premium.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Goods held in trust, or on commission, are be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein, certified by them. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void.

7. Policies of insurance, subscribed by this company, shall not be assignable, either before or after a loss, without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And in case of any sale, transfer, or change of title in the property insured by this company, such insurance shall be void and cease.

8. This company will not be liable for loss or damage caused by lightning, except that which results from fire that may ensue therefrom; nor for any loss either by fire or otherwise, occasioned by the explosion of a steam boiler, or occasioned by camphene, or other inflamable liquids, or by the explosion of gunpowder.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures, and curiosities, are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In cases of fire, or of loss, or damage thereby, or of exposure to loss, or damage thereby, in shall be the duty of the insured to use all possible diligence in saving and preserving the property. And if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such

neglect. In case of loss or damage by fire this company will pay such proportion of the loss or damage (not exceeding the amount insured) as the sum insured by this company bears to the whole value
515 of the property insured. And it is mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire are forthwith to give notice to the company; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified with their oath or affirmation; they shall also declare on oath whether any, and what other insurance has been made on the same property: what was the whole value of the subject insured; what was their interest therein; in what general manner, (as to trade, manufactory, merchandise, or otherwise,) the building insured, or containing the subject insured, and the several parts thereof, were occupied, at the time of the loss, and who were the occupants of such building, and when and how the fireoriginated, so far as they know or believe. And procure a certificate, under the hand of a magistrate, or notary public, (most contiguous to the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows or verily believes that he, she, or they really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein mentioned; and also if required, shall produce their books of account and other proper vouchers; and shall also, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her or their claim thereupon, and subscribe such examination, the same being reduced to writing, and until such proofs, declarations and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, or if it shall appear that there has been any concealment of any fact, or circumstance in any way material to the risk, which may happen either before or after the issuing of this policy, the insured shall forfeit all claim under this policy. Damage to buildings not totally destroyed, shall be appraised by disinterested men, mutually agreed upon by the insured and the office or its agents; and when merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles, according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested appraisers, mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the claimant, one-half of the appraisers' fees to be paid by the insurers. The expense of ascertaining and proving any

loss which may occur, and also forwarding such proofs to the office of the company, shall be paid by the party insured. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and the proof received at the office, and in case differences shall arise, touching any loss or damage, after proof thereof has been received in due form, it may be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on, or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and equal goodness; and to rebuild, or repair the building or buildings, within a reasonable time; giving notice of their intention so to do, within thirty days after having received the proofs of loss required by the seventh article of these conditions.

13. Insurance once made, may be continued for such further term as may be agreed on, the premium therefor being paid, and a renewal receipt being given for the same. And it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding, or adjacent buildings.

14. Where property insured by this company is damaged by removal from abuilding, in which it is exposed to loss by fire, said damages shall be borne by the insured and insurers, pro rata, in the proportion that the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made, by the claimant.

15. It is furthermore hereby expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be subtainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist.

The Western Insurance Company hereby consent that the interest of Medbery, & Co., in the within policy be assigned to Isaac N. Swain, subject, nevertheless, to all the conditions therein contained.

Niles, April 13th, 1856.

E. M. PLIMPTON, *Agent.*

For value received, we hereby transfer, assign, and set over unto Isaac N. Swain and assigns, all our right, title and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

Witness our hand and seal, this tenth day of July, 1856.

[SEAL.] MEDBERY & ALDBICH.

Sealed and delivered in the presence of—
J. S. STEWART.

A. MANDELL, *Commissioner*.
ISAAC N. SWAIN.

516 *Exhibit G.*

No. 30,004. The Washington Union Insurance Company. $500.

By this policy of insurance, the Washington Union Insurance Company, in consideration of six and 25-100 dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure J. S. Stewart, of Watervliet, Michigan, against loss or damage by fire to the amount of five hundred dollars, on his dwelling house situate in the village of Watervliet, on west side of Main street.

And the said company do hereby promise and agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the 12th day of April, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) unto the 12th day of April, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen; and to be paid within ninety days after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy. Provided, always, and it is hereby declared, that this company shall not be liable to make good any loss by theft or any loss, or damage by fire, which may hapen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. And provided further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And, if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company, any greater portion of the loss or damage sustained,

than the amount hereby shall bear to the whole amount insured on the said property. And it is further agreed that in case the above premises shall, at any time after the making and during the time this policy would otherwise continue in force, be so altered or appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, which, by any means whatever, would increase the hazard, unless it be by the consent and agreement in writing of this company, added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease, and be of no force or effect. And it is moreover declared, that this insurance is not intended to apply to, or cover any books of accounts, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted in reference to the application of the insured and to the conditions hereunto annexed as forming part of this policy, and for a more particular description of the property insured, and in order to explain the rights and obligations of the parties hereto.

In witness whereof, the Washington Union Insurance Co. have caused these presents to be signed by their president and attested by their secretary, at their office, in the city of Cleveland, and State of Ohio.

GEORGE MYGATT, *President.*

O. N. SKEELS, *Secretary.*

The Washington Union Insurance Company, office, Cleveland, Ohio.

Officers.

President.—(Vacancy.)
Vice-Pres't and Treas.—Geo. Mygatt.
Secretary.—O. N. Skeels.
General agent.—G. B. Seuter.

irectors.—George Mygatt, Cleveland; F. T. Backus, Cleveland; A. S. Sanford, Cleveland; Benjamin Northrup, Cleveland; G. B. Seuter, Cleveland; O. N. Skeels, Cleveland; C. W. Cook, Cleveland; D. B. Dunham, Cleveland; Timothy Baker, Norwalk; John Clark, Brunswick; J. P. Robinson, Bedford; W. M. Powell, Cleveland; Jacob Perkins, Warren.

Conditions of insurance.

1. All policies must be made and issued upon a survey and description of the property insured, which survey and description shall constitute the application of the assured. Such application must specify the construction and materials of the buildings to be
517 insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction, use and materials, whether any manufactory is carried on within

or about it, and shall also contain a just, full, and true exposition of all the facts and circumstances in regard to the condition and value of the property insured, so far as the same are known to the assured and are material to the risk. And such application shall be taken and deemed to be a part of the policy issued in pursuance thereof, and shall be deemed a warranty on the part of the assured, that the facts therein stated constitute the true condition in all respects of the subject-matter of such insurance. And if any person insuring any building or goods in this office shall make any misrepresentation or concealment, such insurance shall be void.

2. If after insurance is effected, either by the original policy, or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such buildings or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect until the assent of the company shall be obtained thereto. If, during the insurance, the company desire to terminate the risk, it may be done by giving notice to the assured or his representatives, of the intention of the company to do so, in which case the assured shall be entitled to have refunded a ratable proportion of the premium.

3. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

4. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be leasehold, interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void.

5. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease, unless assigned with the assent of the company. And in case of assignment of this policy as collateral security, the assignor will be held responsible for the fulfilment of all of the conditions herein contained, the same as though such assignment had not been made; and in case of loss will be required to make the requisite proof as hereinafter provided.

6. This company will not be liable for damage to property by lightning, except when burned, nor for damages occasioned by the explosion of a steam boiler. The lighting of the premises insured by camphene or spirit gas, without witten permission in the policy, shall render it void.

7. Jewels, plate, metals, paintings, statuary, sculpture, musical

instruments, and curiosities are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance or is inserted in the policy.

518 8. In case of fire, or loss or damage thereby, or of exposures to loss or damage thereby, it shall be the duty of the insured to use all possible dilligence in saving and preserving the property. But in no event shall the company be liable for property purloined or stolen, whether before, after, or during the progress of a fire.

9. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company or its agents; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise or otherwise,) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when, and how the fire originated, so far as they know or believe; what was their interest in the property insured at the time of the loss or damage sustained, that is, whether they were the absolute owners, or how otherwise; they shall also procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers,) that they have made due inquiry into the cause and origin of the fire; and also as to the value of the property destroyed, and are acquainted with the character and circumstances of the person or persons insured; and do know or verily believe that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount which the magistrate or notary public shall certify, a copy of the written portion of the policy to be given in the affidavit of the claimant, and in case of loss of merchandise or other personal property, a list of the articles lost, with their cost value, to be forwarded with the statement; and also, if required, shall produce their books of account, or other proper vouchers, and permit extracts and copies to be made; shall also, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of any thing relating to such loss or damage, or to their claim thereupon, and shall subscribe such examination, the same being reduced to writing, and until such proofs, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable; also, if there appear any fraud, or false swearing the insured shall forfeit all claim under this policy. Where merchandise or other personal

519 property is partially damaged the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made,

naming the quality and cost of each kind. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon. And it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or to repair the building or buildings, within a reasonable time; giving notice of their intention so to do within twenty days after the preliminary proofs shall have been received at the office of the company. The expense of ascertaining and proving any loss which may occur, and also of forwarding such proofs to the office of the company shall be paid by the party insured.

10. Payment of losses shall be made in ninety days after the loss shall have been ascertained and proved, and in case differences shall arise, touching any loss or damage, it may be submitted to the judgment of arbitrators mutually chosen, whose award in writing shall be binding on the parties.

11. Insurance once made, may be continued for such further term as may be agreed on, the premium therefor being paid, and a renewal receipt being given for the same, and it shall be considered as continued under the original representation, so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings.

12. In case of removal of the property, to escape conflagation, the company will contribute ratably with the assured and other companies interested, to the damage and expense of such act of salvage; but the company will not hold themselves liable for any loss or damage upon goods removed from a building not actually on fire, contrary to the declared desire of any officer or agent of the company, or not being ordered or sanctioned by such agent, when personally present and in a situation to be consulted by the asssred.

13. It is furthermore hereby expressly provided, that no suit or action against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

14. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or from depositing ashes or embers in or near the premises insured in wooden vessels, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fires, in places where laws and regulations on this subject exist.

15. In all cases of application for insurance in this company

520 the applicant shall state the true value of the property, and also the amount of incumbrance, if any existed, thereon; and should there afterwards, during the life of the policy, an encumbrance fall or be executed upon the property insured, this policy shall be void until the consent of the company is obtained thereto, and indorsed on said policy by the secretary.

16. If it should so happen, that the whole stock and contribution of the merchants' department of said company should ever be insufficient to pay and satisfy all losses sustained by the members of said company, in such case a just average shall be made, and the payment to be demanded by this policy shall be a dividend of the said stock and contribution, in the proportion which the amount thereof shall bear to the whole amount of loss.

Classifications of hazards.

Goods not hazardous.—Such as are usually kept in dry good stores, also coffee, flour, household furniture and linen, indigo, paints ground in oil, potash, rice, spices, sugar, tea, threshed grain, and other articles not combustible.

Goods, trades, and occupations deemed hazardous. Basket and woodenware sellers' stock, hardware and cutlery, looking glasses in packages, millers' stock, paper in reams, paper hangings, window or plate glass in boxes, watches in packages as imported, wine in glass packages, china, glass, and earthenware in packages, boxes and casks, cotton in bales, flax, groceries with hazardous articles, gun makers or smiths, hay in bundles, hemp, hat finishers, liquor bottling cellers, liquor in glass in packages, Sisil and Manilla grass, oil, pitch, porter houses, rags in packages, sailmakers, saltpetre, sugar makers, sulphur, spirits, liquors, tallow, tar, taverns, turpentine, and victualing shops.

Goods, trades, and occupations deemed extra hazardous.—Booksellers' stock, cabinet makers' stock, confectioner's scock, chair makers' stock, chair, earthen or glassware unpacked, furriers' stock unpacked, jewelers' stock, lamp stock, mathematical and optical instru-
521 ment sellers' stock, musical instruments, pictures, prints, perfumers' stock, pocket-book makers' stock, silversmiths' stock, stationers' stock, toys, upholsters' stock, wine in glass, unpacked, window glass and looking glasses unpacked, acids, inflamable, alcohol, apothecaries, aquefortis, basket bleachers, basket makers, brush makers, blacksmiths, bottling cellers, china, glass, and earthenware to pack and unpack, chocolate makers, dyer's stock, copperplate printers, coppersmiths, druggist, ether, essential oils, furs dressed, furs unpacked, grate makers, hat bleachers, lime unslacked, lamp manufacturers, plumbers, painters, printers of newspapers and engravings, platers and plated-ware manufacturers, phosphours, rag and junk shops, spirits of turpentine, ship chandlers, silversmiths, stove manufacturers, tin or sheet iron workers, upholsters, livery stables.

Goods, trades, and occupations deemed especially hazardous, not insured by this company.—Boat builders, confectionary makers, musical instruments, toy shops with fire works, oil mills, theatres and other places of public exhibition, distillers, sash and blind factories, woolen and cotton factories, steam mills or shops, founderies and furnaces, breweries, chemists, corn kilns, rag stores, rectifiers of liquors, soap and candle factories, paper mills, turners of wood, friction-match manufacturers, planing mills, and pork houses. ☞Gunpower, except in quantities not exceeding 25 lbs., and that in canister securely closed, is expressly prohibited from being deposited, stored, or kept in any building insured or containing any goods or merchandise insursed by this policy unless by special consent, in writing, on the policy.

For value received we, the undersigned, hereby transfer, assign, and set over unto Isaac N. Swain, and assign all our right, title, and interest in this policy of insurance, and all benefit and advantages to be derived therefrom.

Witness our hand and seal this tenth day of July, 1856.

MEDBERY & ALDRICH. [SEAL.]
J. S. STEWART. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. S. STEWART.
SHELDON SICKLES.

OFFICE WASHINGTON UNION INSURANCE CO.,
May 22d, 1856.

The consent of this company is hereby given to the above assignment.

EMORY M. PLIMPTON,
Agent at Niles.
A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

522 *Exhibit H.*

No. 30,008. The Washington Union Insurance Company. $1,250.

By this policy of insurance, the Washington Union Insurance Company, in consideration of twenty-seven and 75-100 dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Messrs. Medbery & Aldrich, of Watervleit, Mich., against loss or damage by fire, to the amount of twelve hundred and fifty dollars, viz: eight hundred dollars on their frame tavern house; two hundred dollars on their frame building, occupied as a boarding house; two hundred and fifty dollars on their frame dwelling house, all situated in Watervleit, Berrien co., Ohio.

* And the said company do hereby promise and agree to make good unto the assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum

insured, as shall happen by fire to the property as above specified, from the thirteenth day of April, one thousand eight hundred and fifty-six, (at 12 o'clock noon,) unto the thirteenth day of April, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon.) The said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within ninety days after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy: Provided, always, and it is hereby declared, that this company shall not be liable to make good any loss by theft, or any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military, or usurped power; and provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable dilligence, give notice thereof to this company,
523 and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect; and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand, or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property; and it is further agreed, that in case the above premises shall, at any time after the making and during the time this policy would otherwise continue in force, be so altered, or be appropriated, applied, or used, to or for the purpose of carrying on or exercising therein, any trade, business, or vocation, which, by any means whatever, would increase the hazard, unless it be by the consent and agreement in writing of this company, added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so applied or used, this policy shall cease, and be of no force or effect; and it is moreover declared that this insurance is not intended to apply to or cover any books of accounts, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion.

And that this policy is made and accepted in reference to the application of the insured, and to the conditions hereunto annexed, as forming part of this policy, and which are to be used and resorted to for a more particular description of the property insured, and in order to explain the rights and obligations of the parties hereto.

In witness whereof, the Washington Union Insurance Company have caused these presents to be signed by their president, and attested by their secretary, at their office, in the city of Cleveland, and State of Ohio.

GEORGE MYGATT, *President.*

O. N. SKEELS, *Secretary.*

The Washington Insurance Company, office Cleveland, Ohio.

Officers.

President.—(Vacancy.)
Vice-Pres't and Treas.—Geo. Mygatt.
Secretary.—O. N. Skeels.
General Agent.—G. B. Seuter.

524 *Directors.*—George Mygatt, Cleveland; F. T. Backus, Cleveland; A. S. Sanford, Cleveland; Benjamin Northrup, Cleveland; G. B. Seuter, Cleveland; O. N. Skeels, Cleveland; C. W. Cook, Cleveland; D. B. Dunham, Cleveland; John Clark, Brunswick; J. P. Robinson, Bedford; W. M. Powell, Cleveland; Jacob Perkins, Warren; Timothy Baker, Norwalk.

Conditions of Insurance.

1. All policies must be made and issued upon a survey and description of the property insured, which survey and description shall constitute the application of the assured. Such application must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings and their contruction, use, and materials; whether any manufactory is carried on within or about it, and shall also contain a just and true exposition of all the facts and circumstances in regard to the condition and value of the property insured, so far as the same are known to the assured and are material to the risk. And such application shall be taken and deemed to be a part of the policy issued in pursuance thereof, and shall be deemed a warranty on the part of the assured, that the facts therein stated constitute the true condition in all respects of the subject matter of such insurance. And if any person insuring any building or goods in this office shall make any misrepresentation or concealment, such insurance shall be void.

2. If after insurance is effected, either by the original policy or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such premises or buildings shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect until the assent of the company shall be obtained thereto. If, during the insurance, the company desire to terminate the risk, it may be done by giving notice to the assured or his representatives, of the intention of the company to do so, in
525 which case the assured shall be entitled to have refunded a rateable proportion of the premium.

3. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

4. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the prelim-

inary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void.

5. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease, unless assigned with the assent of the company. And in case of assignment of this policy as collateral security, the assignor will be held responsible for the fulfillment of all of the conditions herein contained, the same as though such assignment had not been made, and in case of loss will be required to make the requisite proof as hereinafter provided.

6. This company will not be liable for damage to property by lightning, except when burned, nor for damages occasioned by the explosion of a steam boiler. The lighting of the premises insured by camphene, or spirit gas, without written permission in the policy, shall render it void.

526 7. Jewels, plate, medals, painting, statuary, sculpture, musical instruments, and curiosities, are not deemed to be included in any insurance, unless an inventory thereof accompany the application, or is inserted in the policy.

8. In cases of fire, or of loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property. But in no event shall the company be liable for property purloined or stolen, whether before, after, or during the progress of a fire.

9. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the secretary of the company; and as soon as possible, and within thirty days, they shall deliver in a particular account of such loss or damage, signed by their own hands, and verified by their oath or affirmation; they shall also declare on oath, whether any and what other insurance has been made on the same property; what was the whole value of the property insured; what was their interest therein; in what general manner (as to trade, manufactory, or merchandise, or otherwise,) the building insured, or containing the property insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe; and what was their interest in the property insured at the time of the loss or damage sustained, that is, whether they were the absolute owners, or how otherwise: they shall also procure a certificate under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured

or sufferer,) that they have made inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she or they, really and by misfortune, and without fraud or evil practice,
527 hath or have sustained by such fire, loss and damage to the amount which the magistrate or notary public shall certify, a copy of the written portion of the policy to be given in the affidavit of the claimant, and in case of loss of merchandise, or other personal property, a list of the articles lost, with their cost value, to be forwarded with said statement; and also if required, shall produce their books of account or other proper vouchers, and permit extracts and copies to be made; shall also, if required, submit to an examination under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and shall subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing the insured shall forfeit all claim under the policy. Where merchandise, or other personal property, is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon. And it shall be optional with the company to replace the articles lost or damaged, with others of the same kind and equal goodness, and to rebuild or to repair the building or buildings, within a reasonable time, giving notice of their intentions so to do within twenty days after the preliminary proofs shall have been received at the office of the company. The expense of ascertaining and proving any loss which may occur, and also of forwarding such proofs to the office of the company, shall be paid by the party insured.

10. Payment of losses shall be made in ninety days after the loss shall have been ascertained and proved, and in case differences shall arise touching any loss or damage it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties.

11. Insurance once made, may be continued for such further term as may be agreed on, the premium therefor being paid and a renewal receipt being given for the same; and they shall be considered as continued under the original representation, so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings.

12. In case of removal of the property to escape conflagration, the

company will contribute ratably with the assured, and other companies interested, to the damage and expense of such act of salvage; but the company will not hold themselves liable for any loss or damage upon goods removed from a building not actually on fire,
528 contrary to the declared desire of any officer or agent of the company, or not being ordered or sanctioned by such agent when personally present and in a situation to be consulted by the assured.

13. It is furthermore hereby expressly provided, that no suit or action against said company, for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

14. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimnies, or from depositing ashes or embers in or near the premises insured in wooden vessels, or in consequence of neglect or deviation from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist.

15. In all cases of application for insurance in this company, the applicant shall state the true value of the property, and also the amount of incumbrance, if any exist thereon; and should there afterwards, during the life of the policy, an incumbrance fall or be executed upon the property insured, this policy shall be void until the consent of the company is obtained thereto, and endorsed on said policy by the secretary.

16. If it should so happen that the whole stock and contribution of the merchant's department of said company should ever be insufficient to pay and satisfy all losses sustained by the members of said company, in such case a just average shall be made, and the payment to be demanded by this policy shall be a dividend of the said stock and contribution, in the proportion which the amount thereof shall bear to the whole amount of loss.

Classification of hazards.

Goods not hazardous.—Such as are usually kept in dry goods stores, also coffee, flour, household furniture and linen, indigo, paints ground in oil, potash, rice, spices, sugar, teas, threshed grain, and other articles not combustible.

Goods, trades, and occupations deemed hazardous.—Basket and woodenware seller's stock, hardware and cutlery, looking glasses in packages, milliners stock, paper in reams, paper hangings, window or plate glass in boxes, watches in packages as imported, wine in glass, in

packages, china, glass and earthenware in packages, boxes
529 and casks, cotton in bales, flax, groceries with hazardous articles, gun makers or smiths, hay in bundles, hemp, hat finishers liquor, bottling cellars, liquor in glass in packages, Sisal and Manilla grass, oil, pitch, porter houses, rags in packages sail makers, saltpetre, segar makers, sulphur, spiritous liquors, tallow, tar, taverns, turpentine, and victualing shops.

Goods, trades, and occupations deemed extra hazardous.—Bookseller's stock, cabinet-maker's stock, confectioner's stock, chair-maker's stock, chair, earthen or glassware unpacked, jeweler's stock, lamp stock, mathematical and optical instrument seller's stock, musical instruments, pictures, prints, perfumer's stocks pocket-book maker's stock, silversmith's stock, stationer's stock, toys, upholster's stock, watch maker's stock, wines in glass unpacked, window glass and looking glasses unpacked, acids, inflamable, alcohol, apothecaries, acquafortis, basket bleachers, basket makers, brush makers, blacksmiths, bottling cellars, china, glass and earthenware to pack and unpacked, chocolate makers, dyer's stock, copper plate-printers, coppersmiths, druggist, ether, essential oils, furs dressed, furs unpacked, grate makers, hat bleachers, lime unslacked, lamp manufacturers, matches on sale, morocco manufacturers, plumpers, painters, printers of newspapers and engravings, platers and plated-ware manufacturers, phosphorus, rag and junk shops, spirits of turpentine, ship chandlers, silversmiths, stone manufacturers, tin or sheet iron workers, upholsters, livery stables.

Goods, trades, and occupations deemed specially hazardous, not insured by this company.—Boat builders, confectionary makers, musical instrument makers, toy shops with fire works, oil mills, theatres and other places of public exhibition, distilleries, sash and blind factories, woolen and cotton factories, steam mills or shops, founderies and furnaces, breweries, chemists, corn kilns, rag stores, rectifiers of liquor, soap and candle factories, paper mills, turners of wood, friction-match manufactories, planing mills, and pork houses.

☞ Gunpowder, except in quantities not exceeding 25 lbs, and that in canisters securely sealed, is expressly prohibited from
530 being deposited, stored or kept in any building insured, or containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy.

The Washington Insurance Company.

For value received, we, the undersigned, hereby transfer, assign, and set over unto Isaac N. Swain, and assigns, all our right, title, and interest in this policy of insurance, and all benefit and advantages to be derived therefrom.

Witness our hands and seal, this tenth day of July, 1856.

MEDBURY & ALDRICH. [SEAL.]

Signed, sealed, and delivered in the presence of—

J. S. STEWART.

OFFICE WASHINGTON UNION INSURANCE CO.,
May 22, 1856.

The consent of this company is hereby given to the above assignment.

EMORY M. PLIMPTON,
Ag't at Niles.
A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

531 *Exhibit I.*

No. 30,009. The Washington Union Insurance Company. $1000.

By this policy of insurance, the Washington Union Insurance Company, in consideration of twelve fifty-100 dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Messrs. Medbury & Aldrich, of Watervliet, Mich., against loss or damage by fire, to the amount of five hundred dollars, on their frame building, occupied as a grist mill, situate in Watervliet, Berrien Co., Mich.

(Here follows the same as exhibit J, from the star, including the assignment and consent.)

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

5 3 2 *Exhibit J.*

Ætna Insurance Company.—No. 369.

By this policy of insurance, the Ætna Insurance Company, in consideration of sixteen dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Messrs. Medbery & Aldrich, of Watervliet, against loss or damage by fire, to the amount of eight hundred dollars, for the term of one year, on their frame building occupied as a tavern, and situated in the village of Watervliet, Berrien county, Michigan, and more particularly described in survey and diagram No. 369, on file in the office of the agency of this company at Cincinnati, Ohio, which is hereby made a part of this policy.

$800, insured on same building by the Washington Union Ins. Co., of Cleveland, Ohio.

$800, @ 2 per cent., $16 00.

And the said company do hereby promise and agree to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the 30th day of May, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) unto the 30th day of May, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) the said loss or dam-

age to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to this policy: Provided always, and it is hereby declared, that this company shallnot be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; and provided, further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned building shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra hazardous, or included in the memorandum of special rates, in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise in the conditions aforesaid denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to or cover any books of accounts, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

This policy shall not be valid until countersigned by G. W. Hoffman, agent of said Ætna Insurance Co.

In witness whereof, the Ætna Insurance Co. have caused these presents to be acknowledged by the names of their president and secretary, of the city of Hartford, and State of Connecticut.

TH. K. BRUCE,
President.

TH. ALEXANDER, *Secretary.*

Countersigned at Niles, this thirtieth day of May, A. D. 1856.
GEO. W. HOFFMAN, *Agent.*

533 *Conditions of insurance referred to in the body of the foregoing policy.*

1. Goods not hazardous are such as are usually kept in dry goods stores, including coffee, flour, household furniture and linen, indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandize are denominated hazardous, viz: alcohol, basket sellers, brush makers' stock, cabinet furniture, china, earthen or glass ware, or plate glass in boxes, crates, or casks, copper-plate printers, cotton in bales, hat finishers, (without use of fire except for heating their irons,) hardware and cutlery, jeweler's stock, liquor in glass unpacked, looking-glasses in boxes, Manilla grass in bales, paints ground in oil, paper-hanging, porter houses, potash, pocket-book makers' stock, printers of newspapers, rags in packages, sail makers, ship chandlers, spirituous liquors, cigar makers, stationers' stock, snuff makers, threshed grain, tin or sheet-iron workers, victualing houses, watchmakers' stock and tools, wine in glass in packages, window or plate glass in packages.

3. The following trades and occupations, goods, wares, and merchandise are denominated extra hazardous, viz: basket makers, straw bleachers, booksellers' stocks, blacksmiths, boat builders, brass founders, china, earthen or glass ware, or looking-glasses, unpacked, confectioners' stock, cotton unpacked, coopers, copper-smiths, druggists and apothecaries, fur dressers, flax in bales, fringe makers, gun makers or smiths, grate makers, hay pressed in bundles, hemp in bales, ink makers, lamp manufacturers, lamp sellers' stock, lithographers, milliners' stock, morocco manufacturers, optical and mathematical instrument makers, painters' stock, perfumers' stock, phosphorous, pictures and prints, printers of books and jobbing, plate or plated ware manufactories, pocket-book makers, plumbers and pewterers, saltpetre, silversmiths, stables (private,) spirits of turpentine, stove manufactories, tobacco manufacturers, toy keepers' stock, type or stereotype manufacturers, varnish, window and plate glass unpacked.

Mem.--Bakers, bark mills, blind makers, breweries, book-binders, black smith, boat builders', cabinet makers', carpenters', joiners', chair or coach makers' workshops, chemists, cotton mills, dyers, forges, fences, frame makers, furriers, fulling mills, grist mills, hat manufactories, houses, building or repairing, ink, or ivory-black, or lamp-black man-

ufactories, livery stables, lumber or mahogany yards, malt houses, metal and other mills of all kinds, musical instrument makers, oil makers, pump and block makers' shops, paper mills, rope makers, saw mills, ship builders' stock in the yard, ships or other vessels in port, or their cargoes, or when building or repairing, steam engines or boats, tanneries, tallow melters and chandlers, timber yards, woolen mills, and generally all manufacturing establishments, and all trades requiring the use of fire, heat, or steam power not before enumerated, will be insured at special rates of premium. ☞ The following are not to be insured at any rate of premium, viz: ,brimstone works, distilleries, flax mills, gunpowder, oil boiling houses, oakum factories, panoramas or other scenic paintings, patent-leather manufactories, sash and blind factories, snuff mills, steam planing-mills, tar-boiling houses, theatres, turpentine manufactories, varnish makers, steam saw mills, sugar refineries, and India rubber factories.

4. Applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it, and in case of goods and merchandise, whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates. And a false description by the assured of a building or of its contents, or the omission to make known any fact material to the risk, or in a valued policy, an over valuation, shall render absolutely void a policy issued upon such description of valuation; but the office will be responsible for the accuracy of surveys and valuations made by its agents. If, after insurance is effected, either by the original policy or by the renewal thereof, the risk is increased by any means within the control of the assured, or if such buildings or premises shall be, with the assent of the assured, occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during this insurance, any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Ætna Insurance Company, amount to an over-insurance, or the risk be increased by the erection of buildings or by the use or occupation of neighboring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this policy, after notice given to the assured, or his representative, of their intention to do so; in which case the company will refund the premium for the unexpired time.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Goods held in trust or on commission are to be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically in-

sured. If the interest or property insured be leasehold or that of mortgage, or any other interest not absolute, such must be made known to this company and expressed in the policy.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning, aside from fire; nor for damage occasioned by the explosion of a steam boiler, nor for damage by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances; nor for damage occasioned by the use of camphene or burning fluid, coal oil, petroleum, or any of their products, by whatever name designated, unless otherwise expressly provided. The keeping of gunpowder, for sale or on storage, upon or in the premises insured, without written permission in the policy, shall render it void.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures, and curiosities are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company or its agents; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation. They shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statement, and knows or ver-

ily believes that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers; and shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Damage to buildings not totally destroyed shall be appraised by disinterested men, mutally agreed upon by the assured and the office or its agents; and where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested appraisers, mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the claimant, one half of the appraisers' fees to be paid by the insurers—a copy of the written portion of the policy to be given in the affidavit of the claimant in all cases. Also, copy of all other policies insuring same property and sharing payment of the same loss with this company. A claim for loss or damage on a policy assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured, in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or validity whatever, and all liability on the part of this company shall cease. Reinsurance for any other insurance company to be on the basis of joint liability with said company, and in no event will this company be liable for a sum greater than such portion as the sum hereby reinsured bears to the whole sum insured on the property by the company reinsured; and in case of loss, this company to pay their pro rata proportion at the same time, manner, and form as the company reinsured. Plans and specifications of buildings, machinery, and fixtures damaged or destroyed, must be furnished free of expense, when requested. When an inventory of merchandise or other property, sound or damaged, is to be taken in adjusting a claim for loss or damage, this company shall have notice, and the appointment of one or more assistants to complete such listing of property when required by its agent.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on or damage to the

property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings, within a reasonable time; giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company.

13. Insurance once made, may be continued for such further periods as may be agreed on, the premium thereon being paid and a renewal receipt being given for the same, and it shall be considered continued under the original representation, terms, specifications, and conditions, in so far as not plainly varied in writing. When the risk has been changed, either within itself or by the surrounding or adjacent premises, it shall be incumbent on the party insured to give notice thereof, and have the same described and assented to in writing.

14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy, and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires, in places where laws and regulations on this subject exist.

17. It is furthermore hereby expressly provided, that no suit or action against said company, for the recovery of any claim upon or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The Ætna Insurance Company hereby consent that the interest of Medbury & Co. in the within policy be assigned to Isaac N. Swain, subject, nevertheless, to all the conditions therein contained.

GEO. W. HOFFMAN, *Agent.*

For value received we hereby transfer, assign, and set over unto Isaac N. Swain, and assigns, all our right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

Dated at Watervliet, this tenth day of July.

MEDBURY & ALDRICH. [SEAL.]
A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

534 *Exhibit K.*

Ætna Insurance Company.—No. 370.

By this policy of insurance, the Ætna Insurance Company, in consideration of twelve 50-100 dollars, to them paid by the assured hereinafter named. the receipt whereof is hereby acknowledged, do insure Messrs. Medbery & Aldrich, of Watervliet, against loss or damage by fire to the amount of five hundred dollars, for the term of one year, on their frame grist mill, situate in the village of Watervliet, Berrien county, Michigan, and more fully described in survey No. 370, on file in the office of the general agency of this company, at Cincinnati, Ohio, and which is hereby made a part of this policy.

$500 insured on same mill in Washington Union Ins. Co. of Cleveland.

$200 insured on same mill in Jackson Mutual Ins. Co., Jackson, Mich.

$500 @ 2½, $12 50.

And the said company do hereby promise and agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified, from the 30th day of May, one thousand eight hundred and fifty-six, (at 12 o'clock at noon,) unto the 30th day of May, one thousand eight hundred and fifty-seven, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen; and to be paid within sixty days after notice and proof thereof made by the assured, in conformity to the condition annexed to this policy: Provided, always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire. And provided further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned mill shall, at any time after the

making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra hazardous, or included in the memorandum of special rates, in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise, in the conditions aforesaid denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or endorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to, or cover any books of accounts, written securities, deeds, or other evidence of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise otherwise specially provided for.

This policy shall not be valid until countersigned by G. W. Hoffman, agent of said Ætna Insurance Company.

In witness whereof, the Ætna Insurance Co. have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford, and State of Connecticut.

TH. K. BRUCE, *President.*

THO. A. ALEXANDER, *Secretary.*

Countersigned at Niles, this 30th day of May, A. D. 1856.

535 *Conditions of insurance referred to in the body in the foregoing policy.*

1. Goods not hazardous are such as are usually kept in dry goods stores, including coffee, flour, household furniture and linen, indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares, and merchandise, are denominated hazardous, viz: Alcohol, basket sellers, brush makers' stock, cabinet furniture, china, earthen or glassware, or plate glass in boxes, crates, or casks, copper-plate printers, cotton in bales, hat finishers, (without use of fire except for heating their irons,) hardware and cutlery, jewellers' stock, liquor in glass unpacked, looking glasses in boxes, Manilla grass in bales, paints ground in oil, paper hanging, porter houses, potash, pocket-book makers' stock, printers of newspapers, rags in packages, sailmakers, ship chandlers, spirituous liquors, cigar makers, stationers' stock, snuff makers, threshed grain, tin or sheet-iron workers, victualling houses, watch makers' stock and tools, wine in glass in packages, window or plate glass in packages.

3. The following trades and occupations, goods, wares, and merchandise are denominated extra hazardous, viz: Basket makers, straw bleachers, booksellers' stocks, blacksmiths, boat builders, brass founders, china, earthen or glassware, or looking glasses, unpacked, confectioners' stock, cotton unpacked, coopers, coppersmiths, druggists and apothecaries, fur dressers, flax in bales, fringe makers, gunmakers or smiths, grate makers, hay pressed in bundles, hemp in bales, ink makers, lamp manufacturers, lamp sellers' stock, lithographers, milliners' stock, morocco manufacturers, optical and mathematical instrument makers, painters' stock, perfumers' stock, phosphorus, pictures and prints, printers of books and jobbing, plate or plated-ware manufactories, pocket-book makers, plumbers and pewterers, saltpetre, silversmiths, stables, (private,) spirits of turpentine, stove manufactories, tobacco manufactories, toy keepers' stock, type or stereotype manufacturers, varnish, window and plate glass unpacked.

Mem.—Bakers, bark mills, blind makers, breweries, book-binders, blacksmiths, boat builders', cabinet makers', carpenters', joiners', chair or coach makers' work-shops, chemists, cotton mills, dyers, forges, fences, frame makers, furriers, fulling mills, grist mills, hat manufactories, houses, building or repairing, ink, or ivory-black, or lamp-black manufactories, livery stables, lumber or mahogany yards, malt houses, metal and other mills of all kinds, musical instrument makers, oil makers, pump and block makers' shops, paper mills, rope makers, saw mills, ship builders' stock in the yard, ships or other vessels in port, or their cargoes, or when building or repairing, steam engines or boats, tanneries, tallow melters and chandlers, timber yards, woolen mills, and generally all manufacturing establishments, and all trades requiring the use of fire, heat, or steam power, not before enumerated, will be insured at special rates of premium. ☞ The following are not to be insured at any rate of premium, viz: Brimstone works, distilleries, flax mills, gunpowder, oil-boiling houses, oakum factories, panoramas or other scenic paintings, patent leather manufactories, sash and blind factories, snuff mills, steam planing mills, tar-boiling houses, theatres, turpentine manufactories, varnish makers, steam saw mills, sugar refineries, and India rubber factories.

4. Applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it, and in case of goods and merchandise, whether or not they are of the description denominated hazardous, extra hazardous, or included in the memorandum of special rates. And a false description by the assured of a building or of its contents, or the omission to make known any fact material to the risk, or in a valued policy an over-valuation, shall render absolutely void a policy issued upon such description or valuation. But the office will be responsible for the accuracy of surveys and valuations made

by its agents. If, after insurance is effected, either by the original policy, or by the renewal thereof, the risk be increased by any means within the control of the assured, or if such buildings or premises shall be, with the assent of the assured, occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect. If, during this insurance, any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Ætna Insurance Company, amount to an over-insurance, or the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this policy, after notice given to the assured, or his representatives, of their intention to do so; in which case the company will refund the premium for the unexpired time.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest or property insured be leasehold, or that of mortgage, or any other interest not absolute, such must be made known to this company and expressed in the policy.

7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by endorsement thereon. In case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company, in virtue of such policy, shall thenceforth cease. And in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning, aside from fire; nor for damage occasioned by the explosion of a steam boiler, nor for damage by fire resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances, nor for damage occasioned by the use of camphene, spirit gas, or burning fluid, unless otherwise expressly provided. The keeping of gunpowder, for sale or on storage, upon or in the premises insured, without written permission in the policy, shall render it void.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures and curiosities, are not deemed to be included in any insurance unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property. And if

they shall fail so to do, this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company or its agents, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare, on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe, and procure a certificate, under the hand of a magistrate or notary public, (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statement, and knows or verily believes that he, she, or they really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and also, if required, shall produce their books of account and other proper vouchers; and shall, also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claim thereupon, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Damage to buildings, not totally destroyed, shall be appraised by disinterested men, mutually agreed upon by the assured and the office or its agents; and where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested appraisers, mutually agreed upon, whose detailed report, in writing, shall form a part of the proofs required to be furnished by the claimant, one-half of the appraisers' fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases; also, copy of all other policies insuring same property and sharing payment of the same loss with this company. A claim for loss or damage on a policy

assigned, where there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy, in like manner as if no assignment had been made; otherwise this policy shall be void and of no force or validity whatever, and all liability on the part of this company shall cease. Reinsurance for any other insurance company to be on the basis of joint liability with said company, and in no event will this company be liable for a sum greater than such portion as the sum hereby reinsured bears to the whole sum insured on the property by the company reinsured, and in case of loss this company to pay their pro rata proportion at the same time, manner, and form as the company reinsured. Plans and specifications of buildings, machinery, and fixtures damaged or destroyed, must be furnished free of expense, when requested. When an inventory of merchandise or other property, sound or damaged, is to be taken in adjusting a claim for loss or damage, this company shall have notice, and the appointment of one or more assistants to complete such listing of property, when required by its agent.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise, touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do within thirty days after the preliminary proofs shall have been received at the office of the company.

13. Insurance once made may be continued for such further term as may be agreed on, the premium thereon being paid, and a renewal receipt being given for the same, and it shall be considered as continued under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings.

14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with a good and substantial stone or brick chimney, or in consequence of neglect or deviation

from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist.

17. It is furthermore hereby expressly provided, that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The Ætna Insurance company hereby consent that the interest of ——— in the within policy be assigned to ——— ———, subject, nevertheless, to all the conditions therein contained.

GEO. W. HOFFMAN, *Agent.*

For value received, we hereby transfer, assign, and set over unto Isaac N. Swain, and assigns, all our right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

MEDBERY & ALDRICH. [SEAL.]

Dated at Watervliet this tenth day of July, 1856.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

536 *Exhibit L.*

MILWAUKEE, *Wisconsin, Sept.* 26, 1859.

ISAAC N. SWAIN, Esq.

DEAR SIR: You probably know that we have sold the property we bought of you, known as the Watervliet property.

Therefore you will please not pay over to the present owners, (nor apply it on any payment) or to any other party, any moneys you have collected, or may collect for us, of any insurance company for insurance on the grist mill which was burned down about a year ago, at Watervliet, as their receipt would not be good to you.

We have this day drawn on you through Messrs. Parson & Fisher, for the amount so collected, whatever it may be, which order, when paid, will be your receipt in full for the same.

Yours, &c., very respectfully,

MEDBERY & ALDRICH.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Exhibit M.

PALMER, *Mass.*, 18, '57.

J. E. BEBEE, Esq., *Pres. J. C. M. F. I. Co.*

DEAR SIR: On the 27th day of July ultimo, I wrote your secretary, asking him to inform me whether policy No. 10,657, effected by Medbery & Aldrich, Feb. 8th, 1855, and assigned to me is kept good and valid, or rendered void by any act or want of action of theirs, to which I have not yet rec'd any reply. Will you have the kindness to give me the information desired and oblige

Yours, very truly,

I. N. SWAIN.

They have neglected to pay the assessment, which renders policy void until such time its paid.

Yours, &c.,

M. E. DYER, *Sec'y.*

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

537 *Exhibit N.*

NILES, *Sept.* 24, 1858.

ISAAC N. SWAIN Esq'.

DEAR SIR: Yours of the 21st is rec'd. The companies for which I am agent decline any further insurance on your property at Watervliet, and on enquiry among the agents here, I find none that I am sufficiently acquainted with to warrant me in saying that I believe them good. I have, therefore, telegraphed you to that effect, in order that you may procure insurance in N. York.

The am't I have, is, as follows:

Ætna Co.,	saw mill	$1,500
"	grist mill	1,000
"	hotel and store	2,700
"	boarding house	300
		$5,500
Phœnix Co.,	saw mill	1,500
The am't formerly insured by Plimpton, was		$3,000

How divided I did not learn. I learn to-day that the grist mill was burned on Wednesday night. No particulars; will write you as soon as I get any.

R. C. PAINE.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Exhibit O.

$5,000. Rec'd, Detroit, Mich., Ap'l 15, 1856, of Isaac N. Swain, of Palmer, Massachusetts, five thousand dollars to invest in ten per cent. bonds and mortgages on ample and unincumbered real estate in the city of Detroit for two years, interest payable annually. Also, Medbery & Aldrich's draft on James F. Aldrich of Chicago, Ill., drawn July ~~7 14~~, 1856, for seventeen hundred and thirty-five and 54-00 dollars, to collect and account to said Swain for the same.

PHILO PARSONS.

Endorsed: Rec'd full satisfaction for the five thousand dollars for investment at ten per cent.

Palmer, July 16, 1856.

I. N. SWAIN.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

538 *Exhibit P.*

WATERVLIET, *May* 19, 1856.

I. N. SWAIN, Esq.

DEAR SIR: In the course of two or three weeks we expect to have our new mill finished and ready to run; and in relation to the power for turning works, which we have agreed to furnish your brother Russell, would say, that we have this day offered and tendered to him room and power (as per agreement with you) in our new mill, on the place where the old shop stood; and, also, we have given him the privilege to go again into the old shop where it now stands. If he chooses the latter place, we would like to have him tap the flume for his trunk before the water is let in, as it is difficult to shut the water out when it is once let in, besides the detention. We think that Russell wishes you to decide this matter for him, which we hope you will do without delay.

Yours, &c., respecfully,

MEDBERY & ALDRICH.

A. MANDELL, *Commissioner.*
ISAAC N. SWAIN.

Exhibit Q.

MILWAUKEE, Aug. 5, 1856.

I. N. SWAIN, Esq.

DEAR SIR: Yours of July 19, was duly rec'd and now before me, in relation to the discharging the mortgage on our flour mill. I see nothing in the codacill but what we have complied with, except the insurance on the saw mill, and that we now have got to the am't of $4,000, which is ready to be assigned upon your satisfaction price

for its discharge; will you please send it to some person here, Watervliet, or elsewhere; it can be exhanged, that I can get the mortgage off from the property now sold, and much oblige

Yours,

J. W. MEDBURY.

P. S. I did not see Mr. Aldrich on my return from Watervliet, nor have I seen him since, in relation to Russell's shop. I am
539 now satisfied that we are entirely clear from any obligation whatever, by the offers previously made to him and to you; in fact, Russell has declared himself so, and wanted to attach his belt to our shaft, as proposed, to propel his works; but said that you would not let him; he still has that privilege if he chooses to do so.

Yours, &c., respectfully,

J. W. MEDBERY.

540 STATE OF MICHIGAN,
Circuit Court, County of Berrien, ss:

I, Daniel Terriene, clerk of said court, and register in chancery for said county and State, do hereby certify that I have compared the annexed with the record and proceedings in the action therein entitled, and that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this fifteenth day of July, A. D. 1863.

[L. S.] DANIEL TERRIENE,
Clerk & Register in Chancery.

[Stamp]

STATE OF MICHIGAN, *County of Berrien, ss:*

I, Nathaniel Bacon, do hereby certify that I am judge of the second judicial circuit of said State, and presiding judge of the circuit court within and for the county of Berrien, that Daniel Terriene, whose name appears to the foregoing certificate attached to the annexed record, is, and was at the date of said certificate the clerk of said court and register in chancery for said county and State, duly elected and qualified; that said certificate is in due form of law; that I am well acquainted with his handwriting, and the signature to said certificate is genuine, and that the seal thereto is the proper seal of said court.

In testimony whereof, I have hereunto set my hand, this fifteenth day of July, one thousand eight hundred and sixty-three.

NATHANIEL BACON,
Circuit Judge.

[Stamp.]

State of Michigan, the circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, compl't
vs.
JOHN W. MEDBURY, *et als*, def't.

541 SIR: Take notice that the report of the circuit court commissioner of the sale of the mortgaged premises under a decree of this court, heretofore made in this cause, has been duly filed, and that an order has been made therein to confirm said report of sale, unless cause to the contrary be shown within eight days from the entry of said order.

Dated April 27, 1863.

Yours, &c.,
F. MUZZY, *Sol'r for Compl't.*

To JOHN B. GREENOUGH, Esq.

MARSHAL, *April* 27, 1863.

F. MUZZY, Esq.:

DEAR SIR: Yours of to day is received, enclosing notice of report of sale, &c.

Yours, &c.,
J. B. GREENOUGH.

STATE OF MICHIGAN, *County of Berrien, ss:*

Theodore G. Beaver, law partner of F. Muzzy, esq., solicitor for the within complainants, being duly sworn, says, that on the 27th day of April, A. D. 1863, he served a notice, of which the within is a copy, on J. B. Greenough, esq., the solicitor for the defendant, which said service was made by putting the same into the post-office at the city of Niles, properly enclosed in an envelope, directed to the said J. B. Greenough, esq., Marshall, Michigan, the place of residence of said Greenough, and pre-paying the postage thereon.

THEODORE G. BEAVER.

Subscribed and sworn to before me, this 11th day of May, 1863.
HENRY H. COOLIDGE,
Notary Public.

Filed May 12, 1863.
DANIEL TERRIER, *Register.*

542 STATE OF MICHIGAN, *County of Berrien:*

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBURY, *et als*, def't.

APRIL 24, 1864.

On reading and filing the report of S. N. Taylor, esq., one of the circuit court commissioners for said county, of the sale of the mortgaged

premises in this cause, and on motion of Franklin Muzzy, solicitor for complainant, ordered that the same be confirmed, unless cause to the contrary thereof be shown within eight days from the entry of this order.

F. MUZZY, *Sol'r for Compl't.*

Filed April 24th, 1863.
DANIEL TERRIER, *Register.*

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, Eleanor A. Aldrich, defendants.

In the circuit court for the county of Berrien, in chancery.

In pursuance, and in virtue of a decretal order of this court, made in the above cause, and bearing date on the 7th day of January, A. D. 1863, by which it was, among other things, ordered, adjudged, and decreed, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as might be sufficient to raise the amount reported due to the complainant, as therein mentioned, for the principal, interest, and costs in this case, be sold at public auction by, or under the direction of one of the circuit court commissioners in and for the county of
543 Berrien, residing in the county of Berrien, that the sale be made in the county wherein the greater part of the said mortgaged premises are situated; that the circuit court commissioner give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any one of the parties in this cause, might become the purchasers; that the circuit court commissioner execute a deed to the purchaser of the mortgaged premises on the sale thereof; and that the said circuit court commissioner pay to the said complainant or his solicitor, out of the proceeds of the said sale, his costs in this suit to be taxed, and also the amount so reported due as aforesaid, together with the interest thereon, at ten per cent., from the date of said report, or so much thereof as the purchased money of the mortgaged premises would pay of the same, and that the circuit court commissioner take receipt for the amount so paid, and file the same with his report, and that he bring the surplus moneys arising from the said sale, if any there should be, into court without delay, to abide the further order of the court.

And whereby it was further ordered and decreed, that if the moneys arising from the said sale should be insufficient to pay the amount so reported due to the complainant, with the interest and costs as aforesaid, that the said court commissioner specify the amount of such deficiency in his report of the sale.

I, the subscriber and a circuit court commissioner, in and for the county of Berrien, residing in the county of Berrien, do respectfully certify and report, that having been charged by the solicitor for the complainant, with the execution of said decretal order, I advertized said premises to be sold by me at the front door of Berrien county court-house, in the village of Berrien, said county of Berrien, on the 1st day of April, A. D. 1863, at one o'clock in afternoon of said day, and that in said last-mentioned day, cause being shown to me why said sale should be adjourned, and the complainant in said cause assenting to an adjournment of
544 said cause, I did at the day and hour last above mentioned, adjourn said sale until the fifteenth day of April, A. D. 1863, at one o'clock in the afternoon, to take place at the front door of the Berrien county court-house, in the village of Berrien, in said county and State, and that I had notice of such adjournment printed in the Niles Democratic Repubican, underneath said first-mentioned notice, as is required by the statute of the State; that previous to said sale I caused notice thereof to be publicly advertized, eight weeks successively after the first insertion, as follows, viz: by causing the same to be published in the Niles Democratic Republican, a weekly newspaper published in the said county of Berrien, and State of Michigan, which notice contained a brief description of the said mortgaged premises.

And I do further report, that on said 15th day of April, A. D. 1863, the day on which the said sale of the said premises was adjoured to, so advertized as aforesaid, I attended at the time and place fixed for said sale, and exposed said premises for sale, at public auction to the highest bidder, and the said premises were then and there fairly struck off to Isaac N. Swain, Galen M. Fisher, of the city of Detroit, and State of Michigan, and Burrill A. Olney, of Hartford, Van Buren county, and State of Michigan, at the sum of nineteen thousand six hundred dollars, ($19,600,) they being the highest bidders therefor, and that being the highest sum bidden for the same.

And I do further certify, and report that I have executed, acknowledged, and delivered to said purchaser the usual circuit court commissioner's deed for said premises, and have paid over or disposed of the purchase money or proceeds of said sale as follows, viz: I have paid to the solicitor for the complainant the sum of $30, being the amount of his costs of this suit as taxed, and having taken a receipt therefor, which is hereto annexed; I have also paid the printer his costs for publication of the notice aforesaid, the sum of $37 50-100, being the amount of his costs for advertizing as aforesaid, and as allowed by the clerk of said court and as taxed, and having taken a receipt therefor, which is hereto annexed.

I have also paid the register of said court the sum of
545 $7 74-100, being the amount of his costs of this suit, as taxed, and having taken a receipt therefor, which is hereto annexed. I have also retained in my hands the sum of $41 44-100, being the amount of my fees and disbursements in said sale as will appear by reference to the statement of the items thereof annexed

to this my report, and to which I refer. And I have paid to the complainant's solicitor f. complainant in this cause the sum of $19,484 32-100, and have taken a receipt therefor, which is hereto annexed. And I do further certify and report, that the premises so sold and conveyed as aforesaid, were described in said decretal order, and in the deed executed by me as aforesaid, as follows, to wit:

One certain piece or parcel of land, being the northwest fractional quarter of section number nine, (9,) in township number three (3) south, of range number sixteen (16,) containing, according to the United States survey, one hundred and ninety-three and fifteen one hundredths (193 15-100) acres, more or less.

Also, the west half of the northeast quarter of section number (17) seventeen, in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, eighty (80) acres more or less.

Also, the west fractional part of the southwest fractional quarter of section seven, (7,) in township number three (3) south, of range number sixteeen (16) west, containing, according to the United States survey, forty-eight and twenty hundredths (48 20-100) acres, more or less.

Also, the southeast quarter of the southwest fractional quarter of section number seven, (7,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, forty (40) acres, more or less.

Also, the north half of the northwest fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, sixty-three (63) acres, more or less.

Also, the southeast fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3)
546 south, of range number sixteen, (16,) containing, according to the United States survey, one hundred and twelve and fifty hundredths (112 50-100) acres, more of less.

Also, the north fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, twenty-one seventy hundredths (21 70-100) acres, more or less.

Also, the east half of the northeast quarter of section number thirteen, (13,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southeast fraction of section number fourteen, (14,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, three hundred and fifty-three hundredths (3 53-100) acres, more or less.

Also, the east half of the northeast quarter of section number twenty-two, (22,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southwest fractional quarter of the northwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, thirty-nine and forty hundredths (39 40-100) acres, more or less.

Also, the east half of the northwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, sixty-nine and fifteen hundredths acres, (69 15-100) acres, more or less.

Also, the undivided one-half of the northeast fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, one hundred and forty-five and thirty-nine hundreths acres (145 39-100) acres, not including the bed and bank of the Paw Paw river, as meandered and surveyed by the United States, more or less.

Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township number three (3)
547 south, of range number seventeen (17) west, according to the United States survey, as lies north of the center of the main public highway or road leading from Paw Paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervliet in said Berrien county, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres, always excepting and reserving therefrom all those certain fourteen (14) pieces or parcels of land, containing in the aggregate eleven and twenty-one and one-half hundredth (11 21-100) acres, together with their appurtenances, and those certain rights and privileges excepted and reserved in that certain certain deed and conveyance of above-named premises, executed by the said complainant and his wife Vallenia S. Swain, to said defendant, John W. Medbury and James F. Aldrich, bearing date the twenty-seven day of March, one thousand eight hundred and fifty-five, reference being had to said deed and conveyance will more fully show and determine.

Also, the northeast fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according the United States survey, one hundred and forty-five and thirty-nine hundredths (145 39-100) acres more or less.

Also, the right of flowing the following described pieces or parcels of land in consequence of raising a drain on section number twenty-three (23) aforesaid, eight feet in height, above common low water-mark, namely: the southwest fractional quarter of section number eleven, (11,) and the southwest fraction of the southwest quarter of section number thirteen, (13,) and the south fraction of the southeast quarter of section number fourteen, (14,) and the south half of the northeast fractional quarter of section number fourteen, (14,) and the south fraction of section number fifteen, (15,) and the west half of the north-

west quarter of section number twenty-four, (24,) all in township number three (3) south, of range number seventeen (17) west, according to the United States survey in Michigan.

Also, all the power and authority of said defendants, or their
548 heirs, to erect and continue a dam across Paw Paw river, in the county of Berrien, on section twenty-three, township (3) south, of range number seventeen west, together with all the privileges, rights, and franchises subject to and under all the provisions, requirements and restrictions by authority and "act of the legislature of the State of Michigan, approved March 16th, 1849, being the same premises conveyed or caused to be conveyed to said defendant, John W. Medbury and James F. Aldrich, by said complainant and his wife, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues, and profits thereof. And, also, all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties, defendants, of, in, and to the same, and every part and parcel thereof, with the appurtenances. And I do further certify and report, on the 15th day of April, 1863, the day on which the above-described premises were by me sold as aforesaid, that there was due to the complainant in said cause, for principal and interest, the sum of $22,347 43-100, and that the costs, as taxed and allowed in said cause, the sum of $116 68-100, which added to the principal and interest due, gives a sum total of $22,464 11-100; that the premises described above, and which I sold by virtue of said decretal order, brought $19,000; deducting this from sum total of principal and interest and costs in said cause, and it leaves a deficiency of the sum of $2,864 11-100 unpaid and unsatisfied from the proceeds of said sale, and I hereby certify and report that the amount due and unsatisfied on said decree, is the sum of $2,864 11-100 on the 16th day of April, A. D. 1863.

Dated this 24th day of April, A. D. 1863.

S. N. TAYLOR,
Cir. Court Com. in and for Berrien county, Mich.

The circuit court for the county of Berrien.

549 ISAAC N. SWAIN, comp'lt,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

Received at Niles, Michigan, April 15th, A. D. 1863, of Seneca N. Taylor, circuit court commissioner, thirty-seven and 50-100 dollars, being the amount of my charges for printing notice of chancery sale in said cause, less two dollars and fifty cents, paid prior to such sale by said commissioner.

A. J. SHAKSPEARE.

Circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES F. Aldrich, and Eleanor C. Aldrich, defendants.

Plaintiff's bill of costs.

Solicitor's fees	$30 00
Register's fees	7 74
Printer's fees, 16 folios, 9 weeks	37 50
Cir. ct. com'r's fees	
Report of am't due	4 09
Drawing notice of pub	75
Taring clerks costs	50
On sale	10 00
Deed, and report on it	3 50
Attendance on sale	1 00
Travel	60
Stamp on deed	20 00
	$115 68

STATE OF MICHIGAN,
County of Berrien, ss:

I hereby tax the register's fees, in the above-entitled cause, at seven dollars and seventy-four cents.

550 SENECA N. TAYLOR,
Circuit Court Com'r.

STATE OF MICHIGAN,
County of Berrien, ss:

I hereby tax the fees in the above-entitled cause, exclusive of register's fees, at one hundred and seven dollars and ninety-four cents.

DANIEL TERRIER,
Register.

STATE OF MICHIGAN:

The circuit court for the county of Berrien, in chancery.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES T. Aldrich, and Eleanor C. Aldrich, defendants.

Received at Berrien, this 15 day of April, 1863, of S. N. Taylor, cir. ct. com'r, seven and seventy-one hundredths dollars being the

amount of my charges and costs as register, and the amount taxed and allowed and paid to me by said circuit court commissioner, under and by virtue of said decree.

DANIEL TERRIERE,
Register.

The circuit court the county of Berrien.—In chancery.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES T. Aldrich, and Eleanor C. Aldrich, defendants.

Received at Niles Michigan, April 15, A. D. 1863, of Seneca N. Taylor, circuit court commissioner, who made the sale of the premises, under and by virtue of the decree in the above-entitled cause, the sum of thirty dollars, being the amount of my costs in said cause taxed, which costs are paid to me by said circuit court com-
551 missioner, under and by virtue of said decree.

F. MUZZY,
Compl'ts Solicitor.

The circuit court for the county of Berrien, in chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES T. Aldrich, and Eleanor C. Aldrich, defendants.

Received at Niles, Michigan, April the 15th, A. D. 1863, of Seneca N. Taylor, circuit court commissioner, who made the sale of the premises, under and by virtue of the decree in the above-entitled cause, the sum of nineteen thousand four hundred and eighty-four 32-100 dollars, which sum, being part of the proceeds of the sale of the premises, is received by me, under and by virtue of the provisions of said decree, the amount decreed to be paid to said complainant, with interest thereon, as mentioned in said decree.

ISAAC N. SWAIN,
By F. MUZZY,
His Solicitor.

Filed April 24, 1863.
DANIEL TERRIER, *Register.*

STATE OF MICHIGAN,
Berrien county, ss :

Andrew J. Shakspeare, of Niles, in said county, being duly sworn deposeth and says, that he is editor, publisher, and proprietor of the

Niles (Democratic) Republican, a newspaper published weekly at Niles, in said county; that the annexed notice of chancery sales was first published in said paper, on the 14th day of February, A. D. 1863, and was continued to be published therein, once in each week, after the first publication, for 8 successive weeks, the last of which publication was on the 11th day of April, A. D. 1863.

A. J. SHAKSPEARE.

552 Sworn to and subscribed before me, the 15th day of April, 1863.

C. M. ALWARD,
Notary Public, Berrien Co., Mich.

Filed April 15, 1863.
DANIEL TERRINE, *Register.*

Circuit court for the county of Berrien, in chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES F. Aldrich, Eleanor C. Aldrich, defendant.

I, Daniel Terrien, register in chancery, do certify that the files in in the above cause, have this day been duly enrolled.

In testimony whereof, I have hereunto set my hand and affixed the seal of the circuit court, this 15th day of April, A. D. 1863.

[SEAL.] DANIEL TERRIER,
Register.

STATE OF MICHIGAN:

The circuit court for the county of Berrien, in chancery.

At a session of said court, held at the court-house in the village of Berrien, on the seventh day of January, in the year one thousand eight hundred and sixty-three. Present, Hon. Nathaniel Bacon, circuit judge.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, JAMES T. Aldrich, and Eleanor C. Aldrich, defendant.

This cause having been this day brought on to be heard, on the petition for a further decree and order of sale therein, and thereupon, upon consideration thereof, it is ordered, adjuged, and decreed as follows, viz:

On reading and filing the report of S. N. Taylor, esq., one
553 of the commissioners of this court, which report bears date the sixth day of January, in the year one thousand eight hundred and sixty-three, and was made in pursuance of an order of this

court heretofore made in this cause, referring it to one of the commissioners of this court to compute and ascertain the amount due the complainant on the bond and mortgage mentioned and set forth in the bill of complaintant in this cause, and the amount due on the former decree made in this cause, and the amount due the complainant for money paid out by him for taxes and insurance on the property described in the said bill, and secured to be paid by said bond and mortgage, and from which report it appears that there was due the complainant, at the date thereof, the sum of twenty-one thousand seven hundred and forty-nine and 33-100 dollars; and on motion of Franklin Muzzy, solicitor for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the said report and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged, and decreed, that the said defendants pay, or cause to be paid, to the said complainant, or to his said solicitor, the amount so reported due as aforesaid, together with the interests and costs, on or before the thirty-first day of January, in the year one thousand eight hundred and sixty-three, and in default thereof, that all and singular the mortgage premises mentioned in the bill of complaint in this cause, and hereafter described to raise the amount due the complainant as aforesaid, be sold at public auction, by or under the direction of one of the commissioners of this court, according to the exigency of the former decree made in this cause, at any time after the said thirty-first day of January, in the year one thousand eight hundred and sixty-three; that the sale be made in the county where the said mortgage premises, or the greater part thereof, are situated; that the said commissioner give public notice of the time and place of such sale, according to the course and practice of this court; and that the complainant, or any of the parties in
554 this cause, may become the purchaser; that the said commissioner execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; and that the said commissioner, out of the proceeds of said sale, pay to the complainant or his solicitor, his costs in this suit to be taxed, and also the amount reported to be due as aforesaid, together with interest thereon, at the rate of ten per cent. per annum, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same, and that the said commissioner take a receipt for the amount so paid, file the same with his report, and that he bring the surplus money arising from said sale, if any there be, into court without delay, to abide the further order of this court. And it is further ordered, adjudged, and decreed, that the defendants and all persons claiming or to claim from or under them, or either of them, be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof. And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale, be let into possession thereof, and that any of the parties in this cause, who may be in possession of said premises or any part thereof, and any per-

son who, since the commencement of this suit, has come into possession under them, or either them, deliver possession thereof to such purchaser, or purchasers, on the production of the said deed of such premises, and a certified copy of the order confirming the report of such sale after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the complainant, with interests and costs, and expenses of sale as aforesaid, that said commissioner specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendants, John W. Medbury and James F. Aldrich, who were personally liable for the debt secured by said mortgage, pay to the complainant the amount of such deficiency, with interest thereon from the date of such report, and that the complainant have execution therefor.

555 The description and particular boundaries of the property authorized to be sold, under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, as follows, viz:

The southwest fractional quarter of section nine; the west half of the northeast quarter of section seventeen; the west fractional part of the southwest fractional quarter of section seven; the southeast quarter of the southwest fractional quarter of section seven; the north half of the northwest fractional quarter of section eighteen; the southeast fraction of the northeast fractional quarter of section eighteen; the north fraction of the northeast fractional quarter of section eighteen, in township three south, of range, sixteen west; the east half of the northeast quarter of section thirteen; the southeast fraction of section fourteen; the east half of the northeast quarter of section twenty-two; the southwest fractional quarter of the northwest fractional quarter of section twenty-three; the east half of the northwest fractional quarter of section twenty-three; the undivided one-half of the northeast fractional quarter of section twenty-three, not including the bul and bank of the Paw Paw river, as meandered and surveyed by the United States. Also, so much of the southwest fractional quarter of section number twenty-three as lies north of the centre of the main public highway or road leading from Paw Paw to St. Joseph, as surveyed by Jubal Enos, and recorded in the record of highways in the township clerk's office of Watervliet, on page five, excepting and reserving therefrom all those certain pieces or parcels of land, containing in the aggregate eleven and twenty-one and a half hundredths (11 21½-100) acres, together with their appurtenances, and those certain rights and privileges excepted and reserved in that certain deed and conveyance of said premises, executed by said Isaac N. Swain, and wife, to Medbury and Aldrich, bearing date the twenty-seventh day of March, A. D. 1855. The northeast fractional quarter of section twenty-three; also, the right of flowing the

556 following described parcels of land in consequence of raising a dam on section twenty-three, eight feet in height, above common low water-mark, namely: the southwest fractional quarter

of section eleven; the southwest fraction of the southwest quarter of section thirteen; the south fraction of the southeast quarter of section fourteen, and the south half of the northeast fractional quarter of section fourteen, and the south fraction of section fifteen, and the west half of the northwest quarter of section twenty-four, all of said lands lying in township three south, of range sixteen west; also all the power and authority of said parties of the first part, being said defendants) and their heirs to erect and continue a dam across Paw Paw river, in the county of Berrien, in section twenty-three, in township three south, of range seventeen west, together with all privileges, rights, and franchises, subject to, and under all the provisions, requirements, and restrictions by authority, an act of the legislature of the State of Michigan approved, March 16, 1849.

(Signed) NATHANIEL BACON,
Circuit Judge.

(Countersigned) DANIEL TERRIERE,
Register.

Filed January 7, 1863.
DANIEL TERRIERE, *Register.*

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

To the circuit court for the county of Berrien.—In chancery.

In pursuance and in virtue of an order of this court, made in the above cause, and bearing date the 6th day of January, A. D. 1863, a copy of which is hereto annexed, and forms a part of this my report, by which it was referred to me, the undersigned, one of the
557 circuit court commissioner, of said county, to ascertain and report to said court the amount due the complainant on the bond and mortgage mentioned and described in the pleadings in the cause, and the amount due on the former decree made in this cause, and the amount of moneys paid out and expended by the complainant for insurance and taxes on the premises described in said mortgage mentioned in the pleadings in this cause, and secured to be paid by said mortgage, and that I report such amount to this court with all convenient speed;

I, the subscriber, one of the circuit court commissioners of said county, residing in said county of Berrien, do respectfully certify and report that I have computed and ascertained the amount due to the complainant in this cause as aforesaid, and that the amount so due on the said bond and mortgage, and the amount due on the former decree made in this cause, and the amount of moneys paid

out and expended by the complainant for insurance and taxes on the premises described in said mortgage mentioned in the pleadings in this cause, and secured to be paid by said mortgage for the principal and interest up to and including the date of this report, in the sum of $21,749 33-100.

And I do further certify and report, that the schedule hereto annexed marked "A," and making a part of this my report, contains a statement and amount of the principal and interest moneys due to the complainant as aforesaid, the period of the computation of the interest and its rate, and to which for greater certainty I refer; and further certify that the schedule aforesaid, marked "A," hereto annexed, contains the amount of money paid by complainant for taxes on the lands and premises described in the bill of complaint in this cause, as appears from the testimony and proofs had before me. All which is respectfully submitted.

S. N. TAYLOR,
Circuit Court Commissioner.

Berrien Springs, Jan. 6th, 1863.

Schedule marked "A," referred to in foregoing report.

On bond and mortgage referred to in the foregoing report and last instalment due and unpaid Sept. 28, A. D. 1862.

558	To last instalment	$5,000 00
	To int. thereon one year at 7 per cent	350 00
	To interest on principal and int., to wit, on $5,350, from Sept. 28th, A. D. 1862, to Jan. 6th, A. D. 1863, at 10 per cent., 3 mos. 8 days, is	145 64
	To amount of decree in chancery for what was due April 19, A. D. 1862	14,995 56
	Interest on said sum from April 19, A. D. 1862, to Jan. 6, 1863, 8 mos. 17 days, at 10 per cent.	1,070 50
	To amount of taxes paid on the lands described in the mortgage mentioned in this cause	187 63
	Amount due complainant, Jan. 6, '63	$21,749 33

S. N. TAYLOR,
Circuit Court Commissioner.

STATE OF MICHIGAN:

The circuit court for the county of Berrien, in chancery.

At a session of said court, held at the court-house in the village of Berrien, on the 6th day of January, A. D. 1863. Present, the Hon. Nathaniel Bacon, circuit judge.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, and Eleanor C. Aldrich, defendant.

Upon reading and filing the petition of the complainant in this cause, and on motion of Franklin Muzzy, solicitor for the complain-

ant, ordered that this cause be referred to S. N. Taylor, esq., one of the circuit court commissioners in and for said county, to ascertain and report to this court the amount due the complainant on the bond and mortgage mentioned and described in the pleadings in this cause, and the amount due on the former decree made in this cause, and the amount of moneys paid and expended by the complainant for insurance and taxes on the premises described in said mortgage mentioned in the pleadings in this cause and secured to be paid by said mortgage, and that he report such amounts to this court with all convenient speed.

NATHANIEL BACON,
Circuit Judge.

Filed January 7, 1863.
DANIEL TERRIERE, *Register.*

559 MARSHALL, MICH., *Dec.* 17, 1862.

F. MUZZY, Esq:

DEAR SIR: Yours of 16th is at hand, enclosing a paper purporting to be a copy of a petition in Swain *vs.* Medbury, with a notice endorsed thereon.

Yours, truly,

J. B. GREENOUGH.

The circuit court for the county of Berrien.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, and Eleanor C. Aldrich, defendants. } In chancery.

Your petitioner, Isaac N. Swain, respectfully represents that on the nineteenth day of April, in the year one thousand eight hundred and sixty-two, a decree and order of sale was made by this court, before the judge thereof, in the above entitled cause, by which said decree and order of sale it appears that there was due the complainant on the eighteenth day of April, A. D. 1862, the sum of fourteen thousand and ninety-five and 56-100 dollars, and that the premises described in said decree were directed to be sold by virtue of said decree to satisfy said amount, and that said premises never have been sold by virtue of said decree to satisfy said amount as aforesaid. Your petitioner further represents that since such decree so made as aforesaid, there has been default upon other payments mentioned in the bond and mortgage mentioned and described in the bill filed in said cause; that he has paid out and expended large sums of money in the payments of taxes on the lands described in said mortgage and mentioned in said bill, and also has paid out and expended large sums of money for the insurance of the building and tenements situated on said lands described in said mortgage, and secured to be paid by said mortgage. Whereupon, your petitioner prays that an account be taken, by the circuit court commissioner in and for said county, of the moneys so due your petitioner aforesaid, and the moneys so paid out

and expended by him as aforesaid, and that he ascertain and
560 report to this court the amount so due your petitioner as aforesaid on the bond and mortgage described in said bill, and the amount paid out and expended by him as aforesaid, and secured to be paid by said bond and mortgage, and that your petitioner have a further order, founded on such decree, directing a sale of the mortgaged premises to be made under such decree, and according to the exigency of such order, to satisfy the amount so due your petitioner on such former decree, and so reported due as aforesaid, with the costs of this petition, and your petitioner will ever pray, &c.

F. MUZZY, *Solicitor for Compl't.*

Dated December 16th, 1862.

STATE OF MICHIGAN, *County of Berrien, ss:*

Theodore G. Beaver, being duly sworn says, that on the 16th day of December, A. D. 1862, he served a copy of the within petition, and a notice therein endorsed, on Jas. B. Greenough, esq., which said service was made by putting the same into the post office in the city of Niles, properly endorsed in an envelope, directed to the said Jas. B. Greenough, esq., at Marshall, Mich., and prepaying the postage thereon.

THEO. G. BEAVER.

Subscribed and sworn to before me, this 6th day of January, A. D. 1863.

S. N. TAYLOR,
Notary Public, Berrien Co., Mich.

Endorsed:

Take notice that an application will be made at the term of this court, to be held at the court-house in the village of Berrien, on the Monday in January, on the first day of the term, or as soon thereafter as counsel can be heard, for a further order in this cause, according to the prayer of a petition, copy of which you are hereby served.

Yours, &c.,

F. MUZZY, *Sol. for Defendant.*

Dated Niles, Dec. 16, 1862.

G. B. GREENOUGH, Esq., *Sol. for Compl't.*

561 STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

At a session of said court, held at the court-house in the village of Berrien, on the 6th day of January, A. D. 1863. Present, the Hon. Nathaniel Bacon, circuit judge.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

Upon reading and filing the petition of the complainant in this

cause, and on motion of Franklin Muzzy, solicitor for the complainant, ordered that this cause be referred to S. N. Taylor, esq., one of the circuit court commissioners in and for said county, to ascertain and report to this court the amount due the complainant on the bond and mortgage mentioned and described in the pleadings in this cause, and the amount due on the former decree made in this cause, and the amount of moneys paid out and expended by the complainant for insurance and taxes on the premises described in said mortgage mentioned in the pleadings in this cause, and secured to be paid by said mortgage, and that he report such amounts to this court with all convenient speed.

NATHANIEL BACON.
Circuit Judge.

Recorded and filed Jan. 6th, 1863.
DANIEL TERRIERE, *Register.*

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

At a session of said court, held at the court-house in the village of Berrien, on the nineteenth day of April, in the year one thousand eight hundred and sixty-two, (1862.) Present, Hon. Nathaniel Bacon, circuit judge.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

This cause came on to be heard on the petition for a further
562 decree therein; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

On reading and filing the report of Charles R. Brown, one of the commissioners of this court, which report bears date the eighteenth day of April, in the year one thousand eight hundred and sixty-two, and was made in pursuance of an order of this court heretofore made in this cause, referring it to one of the commissioners of this court, to compute the amount due to the complainant on the bond and mortgage mentioned and set forth in the bill of complaint and in the former decree made therein, from which it appears that there was due to the said complainant at the date of said report, for said principal and interest, the sum of fourteen thousand nine hundred and ninety-five and 56-100 dollars ($14,995 56,) and on motion of Franklin Muzzy, solicitor and counsel for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged, and decreed, that the said defendants pay or cause to be paid to the said complainant, or to his said solicitor,

the amount so reported due as aforesaid, together with the interest and costs, on or before the first day of August, in the year one thousand eight hundred and sixty-two; and in default thereof, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, to raise the amount due to the complainant for the principal, interest, and costs in this case, be sold at public auction, by or under the direction of the said commissioner of this court, at any time after the said first day of August, in the year one thousand eight hundred and sixty-two; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said commissioner give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser; that the said commissioner, out of the proceeds of said sale, pay to the complainant, or his solicitor, all costs in this suit to be taxed
563 and also the amount so reported due as aforesaid, together with interest thereon at the rate of ten per cent., from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said commissioner take receipt for the amount so paid, and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there be, into court, without delay, to abide the further order of this court. And it is further ordered, adjudged, and decreed, that the defendants and all persons claiming or to claim from or under them or either of them, be forever barred and foreclosed of, and from all equity of redemption, and claim of, in, and to said mortgaged premises and every part and parcel thereof. And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof; and that any of the parties of this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the said deed for such premises and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainant with interest and costs and expenses of sale as aforesaid, that said commissioner specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendants, John W. Medbery and James F. Aldrich, who are personally liable for the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon, from the date of such report, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause are as follows, viz: The southwest fractional quarter of section nine; the west

564 half of the northeast quarter of section seventeen; the west fractional part of the southwest fractional quarter of section seven; the southeast quarter of the southwest fractional quarter of section seven; the north half of the northwest fractional quarter of section eighteen; the southeast fraction of the northeast fractional quarter of section eighteen; the southeast fraction of the northeast fractional quarter of section eighteen; the north fraction of the northeast fractional quarter of section eighteen, in township three south, of range sixteen west; the east half of the northeast quarter of section thirteen; the southeast fraction of section fourteen; the east half of the northesst quarter of section twenty-two; the southwest fractional quarter of the northwest fractional quarter of section twenty-three; the east half of the northwest fractional quarter of section twenty-three; the undivided one-half of the northeast fractional quarter of section twentry-three, not including the bed and bank of the Paw Paw river, as meandered and surveyed by the United States. Also, so much of the southwest fractional quarter of section number twenty-three, as lies north of the centre of the main public highway, or road leading from Paw Paw river to St. Joseph, as surveyed by Jubal Enos, and recorded in the record of highways, in the township clerk's office of Watervliet, on page five, excepting and reserving therefrom all those certain fourteen pieces or parcels of land, containing in the aggregate eleven and twenty-one and a half hundredths (11 21½-100) acres, together with their appurtenances, and those certain rights and privileges, excepted and reserved in that certain deed and conveyance of said premises, executed by said Isaac N. Swain and wife, to Medbery and Aldrich, bearing date the twenty-seventh day of March, A. D. 1855, the northeast fractional quarter of section twenty-three; also, the right of flowing the following described parcels of land, in consequence of raising a dam on section twenty-three, eight feet in height, above common low water mark, namely, the southwest fractional quarter of section eleven; the southwest fraction of the southwest quarter of section thirteen; the south fraction of the southeast quarter of section fourteen, and the south half of the northeast fractional quarter of section fourteen, and the south fraction of section fifteeen, and the west half of the north-
565 west quarter of section twenty-four; all of said lands being in township three south, of range fourteen west: also, all the power and authority of said parties of the first part (being said defendants) and their heirs, to erect and continue a dam across the Paw Paw river, in the county of Berrien, in section twenty three, in township three, south, of range seventeen west, together with all the rights, privileges, and franchises, subject to and under all the provisions, requirements, and restrictions, by authority and act of the legislature of the State of Michigan, approved, March 16, 1849.

N. BACON, *Circuit Judge.*

Filed, July 11, 1862.

GEORGE H. MENDECK, *Register.*

STATE OF MICHIGAN:

The circuit court, for the county of Berrien. In chancery.

At a session of said court, held at the court house in the village of Berrien, on the eighteenth day of April, A. D. 1862. Present, Hon. Nathaniel Bacon, circuit judge.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

Upon hearing the petition of the complainant in this cause for a further decree therein, and as appears by said petition, a decree was duly made therein, and that since such decree, default has been made on other payments described in the bond and mortgage mentioned in the bill filed in this cause, and that the premises described in the said decree never have been sold to satisfy the same, and upon filing due proof of a service of a copy of said petition upon the parties interested therein, and upon motion of Franklin Muzzy, solicitor for the complainant, it is ordered that it be referred to the circuit court commissioner to compute and ascertain the amount due on said bond and mortgage described in said bill, and upon the decree heretofore made in this cause, and report the same to this court.

N. BACON, *Circuit Judge.*

565¼ In the circuit court for the county of Berrien. In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

To the circuit court for the county of Berrien. In chancery:

In pursuance and by virtue of an order of reference heretofore entered in this cause, directing me, the undersigned, the circuit court commissioner in and for said county, to compute the amount due the complainant on the bond and mortgage mentioned in the bill of complaint filed in this cause, and on the decree heretofore entered in this cause, I have this day taken an account of the amount due on said bond, mortgage and decree, and find the same to be fourteen thousand nine hundred and ninety five and 56-100 dollars, and that on the 28th day of September, A. D. 1862, there will be due the complainant on said bond and mortgage, for principal and interest, the further sum of five thousand three hundred and fifty dollars. Reference as to the facts herein stated, and as to the manner of making said computation is made to the bond mentioned in said bill, and to schedule A, hereto attached.

Dated April 18, 1862.

565½ Fees, $5,00

CHARLES R. BROWN,
Cir. C't Commissioner.

566 *Schedule "A."*

1859.	Dr.			
Sep. 28.	To int. one year on $20,000, at 7 per cent..	$1,400 00		
	To one installment, now due, of.....	5,000 00		
			$6,400 00	
	To annual int. on $6,400, after due, at 10 per cent., (as per terms of bond) from Sep. 28, 1859, to April 18, 1862, two years, six months and twenty-one days..		1,637 33	
1860.				$8,037 33
Sep. 28.	To one yr. int. on $15,000, at 7 per cent. ..	1,050 00		
	To one installment now due.....	5,000 00		
			6,050 00	
	To annual interest on $6,050 00, after due, at 10 per cent, from Sep. 28, 1860, to April 18, 1862, 1 yr., 6 ms., 21 days....		942 79	
1861.				6,992 79
Sep. 21.	To int. one year on $10,000, at 7 per cent..	700 00		
	To one installment, now due, of.....	5,000 00		
			5,700 00	
	To interest on $5,700 00, 10 per ct., from Sep. 28, 1861, to April 18, 1862, six months, 21 days.....		318 25	
				6,018 25
				21,048 37
1858.	Cr.			
Dec 15.	By 1st payment from Ætna Ins. Co., $1,000, & int. to Sep. 28, '59, 7 per ct.....		1,055 02	
	By an. int. on this $1,055 02 to date, 2 yrs. 6 mo., 21 days, 10 pr. ct.....		269 90	
1859.			1,324 92	
Nov. 10.	By 2d pay't of S. Carr, $2,020 00, an. int. on same, 2 yrs. 4 mos. 29 days, $487 61.		2,507 61	
Dec. 2.	By 3d pay't of W. Aldrich, $90 00. & on. int. on same, to date, 10 p. c., 2 y., 4 mo.,			
1860.	16 d.....		111 40	
Aug. 28.	By 4th pay't of C. & A., $400 00, & an. in. on same, 1 y., 7 m., 21 d., 10 p c.....		465 66	
Sep. 3.	By 5th pay't of C. & A., $776 73, & an. int. on same, 1 y., 7 m., 15 d., 10 p. c..		902 93	
" 17.	By 6th pay't of do, $261 17, & int., 1 y., 7 m., 1 d., 10 p. c.....		302 59	
1861.				
June 8.	By 7th pay't of J. S. Shank, $403 00, int. 10 m., 10 days, 10 p. c.....		437 70	
				6,052 81
	Leaving a balance due compt. April 18, 1862			$14,995 56
	Amount to become due Sep. 28, 1862.....		5,000 00	
	Int. on same from Sept. 28, 1061, one year, 7 per cent.....		350 00	
			$5,350 00	

CHARLES R. BROWN,
Circuit Court Commissioner.

Filed April 18, 1862.
Geo. H. Murdock, *Register.*

567 STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, & Eleanor C. Aldrich, defendants.

At a session of said court, held at the court house in the village of Berrien, in said county, on the ninth of Septmber, in the year one thousand eight hundred & fifty-eight. Present, Honorable Nathaniel Bacon, circuit judge.

This cause having been this day brought on to be heard, & it appearing to this court by a decree entered in the same, on the twelfth day of June, one thousand eight hundred and fifty-eight, that on that day there was actually due the said complainant, for principal and interest, the sum of seven thousand & six hundred dollars & ninety-three cents. and that the amount secured by and unpaid upon the bond & mortgage in said bill of complaint described, including interest thereon to the date of said decree, was thirty-four thousand & eighty dollars & ninety-seven cents, & also that other sums might become due & arise to said complainant, by reason of moneys advanced or to be advanced by said complainant to secure the insurance of the premises from losses by fire, & also for the payment of taxes assessed and levied on said premises, and it further appearing by said decree, that this cause was referred to the circuit court commissioner of said county, in order that he might ascertain & report to this court the situation of said mortgaged premises, & whether the same can be sold in parcels without injury to the interest of the parties, & on reading and filing said report, from which it appears that said premises are so situated that they cannot be sold in parcels without injury to the interests of the parties, for the reasons set forth in said report, & on motion of F. Muzzy, solicitor for complainant, it is ordered, adjudged, and decreed, & this court, by virtue of the authority therein vested, doth order, adjudge, & decree that said report, & all things therein contained, do stand ratified and confirmed; & it is further ordered, adjudged, & decreed that all and singular of the said
568 mortgaged premises mentioned in the bill of complaint in this cause & hereinafter described, be sold at public auction, by or under the direction of the circuit court commissioner in & for the county of Berrien, unless previous to such sale said defendants pay to said complainant, or his solicitor, or to said commissioner, the amount so found to be actually due upon said bond & mortgage, with interest thereon from the date of said decree, at the rate of ten per cent. per annum, & the complainants costs of this suit, & the costs of such sale up to the time of such payment. That such sale be made in the county of Berrien, where most of said premises are situated; that said commissioner give public notice of the time and place of such sale, according to the course and practice of this court, & that the

complainant, or any party in this cause, may become the purchaser. that the master execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale, & that the said circuit court commissioner out of the proceeds of said sale, retain his fees, disbursements & commissions in said sale, & pay to the complainant or his solicitor, out of said proceeds, his costs in this suit to be taxed, and also the amount so reported as secured and unpaid as aforesaid, together with interest thereon, at the rate of ten per centum, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same, & that the said circuit court commissioner take receipts for the amount so paid, & file the same with his report, & that he bring the surplus moneys arising from said sale, if any there shall be, into court without delay, to abide the further order of this court. And it is further ordered, adjudged, and decreed that the defendants, & all persons claiming or to claim from or under him, or them, or either of them, & all persons having a lien subsequent to such mortgage, by judgment or decree upon the land contained in said mortgage, & his or their heirs, and personal representatives, and all persons having any lien or claim, by or under such subsequent judgment or decree, & their heirs & personal representatives, and all persons claiming under them be forever barred & foreclosed of, & from all equity of redemption & claim of, in & to said mortgaged premises, & every part & parcel thereof.

And it is further ordered that purchaser or purchasers of
569 *of* said mortgaged premises at such sale be let into possession thereof, & that any of the parties in this cause who may be in possession of said premises or any part thereof, & any person who, since the commencement of this suit, has come in possession under them, or either of them deliver possession thereof to such purchaser or purchasers on production of the master's deed for such premises, & a certified copy of the order confirming the report of such sale, after such order has become absolute.

And it is further ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree that this cause be referred to the circuit court commissioner in and for said county of Berrien, and that he ascertain and report the amount that has fallen due upon said bond and mortgage since the commencement of this suit, and the amount due to said complainant by reason of advances made and monies paid by him for taxes and insurance upon said premises.

And it is further ordered and decreed that if the money arising from said sale shall be insufficient to pay the amount so reported as actually due to the complainant, with the interests and costs and expenses of sale as aforesaid, that said circuit court commissioner specify the amount of such deficiency in his report of said sale; and that on the coming in and confirmation of said report the defendants, John W. Medbury & James F. Aldrich, who are personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency which is then due and payable, with interest thereon at the rate of ten per centum per annum,

from the date of such last mentioned report, and that the complainant have execution therefor. And in case the amount reported as actually due, with interest, and the costs of this suit shall be paid before such sale, it is further ordered that said complainant be at liberty at any time hereafter, when any principal sum or interest secured by said bond and mortgage shall become due according to the conditions of said bond, to go before the said circuit court commissioner on the foot of this decree, and procure the report of
570 the amount which shall then be due thereon, to the end that upon the coming in and confirmation of such report a decree may be made for a sale of said premises to satisfy the amount which shall then be due. with interest and the cost of such report and sale. And in case said premises shall be sold under this decree, and shall not produce sufficient to satisfy the amount so reported as secured and unpaid, with the interest and costs of this suit and of such sale, it is then further ordered that the said complainant be at liberty, at any time thereafter, when any such deficiency of principal and interest shall have become due, according to the conditions of said bond, to apply to this court for an execution against said defendants, John W. Medbury & James F. Aldrich, who are personally liable for the payment of the debt secured by the said mortgage, to collect the amount which shall then be due thereon. The description and particular boundaries of the property authorized to be sold under and by virtue of the decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, viz: all those certain pieces or parcels of land, rights, privileges, and franchises, situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, to wit: One certain piece or parcel of land, being the south west fractional quarter of section number nine, (9,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, one hundred and ninety-three and fifteen hundredths (193 15-100) acres, more or less. Also, the west half of the northeast quarter of section number seventeen, (17,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, eighty (80) acres, more or less. Also, the west fractional part of the southwest fractional quarter of section seven, (7,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, forty-eight and twenty hundredths (48 20-100) acres, more or less. Also the southeast quarter of the southwest fractional quarter of section number seven, (7,) in township three (6) south, of range number sixteen (16) west, containing, according to the United States survey forty (40) acres, more or loss. Also, the north half of the northwest fractional quarter of section num-
571 ber eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, sixty-three 63) acres, more or less. Also, the southeast fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3) south, of range num-

ber sixteen (16) west, containing, according to the United States survey, one hundred and twelve and fifty hundredths (112 50-100 acres, more or less. Also, the north fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, twenty-one and seventy-hundredths (21 70-100) acres, more or less. Also, the east half of the northeast quarter of section number thirteen, (13,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less. Also, the southeast fraction of section number fourteen, (14,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, three and fifty-three hundredths (3 53-100) acres, more or less. Also, the east half of the northeast quarter of section number twenty-two, (22,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or loss. Also, the southwest fractional quarter of the northwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, thirty-nine and forty hundredths (39 40-100) acres, more or less. Also, the east half of the northwest fractional quarter of section number twenty-three (23) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, sixty-nine fifteen hundredths (69 15-100) acres, more or less. Also, the undivided one-half ($\frac{1}{2}$) of the northeast fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, one hundred and forty-five and thirty-nine hun-
572 dredths (145 39-100) acres, not including the bed and bank of the Paw Paw river, as meandered and surveyed by the United States, more or less. Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, according to the United States survey, as lies north of the centre of the main public highway or road leading from Paw Paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervliet aforesaid, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres, (always excepting and reserving therefrom all those certain fourteen (14) pieces or parcels of land, containing in the aggregate eleven and twenty-one and a half hundredths (11 21½-100) acres, together with their appurtenances, and those certain rights and privileges excepted and reserved in that certain deed and conveyance of above-named premises executed by said party of the second part, and his wife Villonia S. Swain, to said parties of the first part, bearing date the twenty seventh day of March, one thousand eight hundred and fifty-five, reference being had to said deed and conveyance will more fully show and determine.) Also, the northeast fractional

quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, one hundred and forty-five and thirty-nine hundredths (145 39-100) acres, more or less. Also, the right of flowing the following described pieces or parcels of land, in consequence of raising a dam on section number twenty-three (23) aforesaid, eight (8) feet, in height above common low water-mark, namely: the southwest fractional quarter of section number eleven, (11,) and the southwest quarter of section number thirteen, (13,) and the south fraction of the southeast quarter of section number fourteen, (14,) and the south half of the northeast fractional quarter of section number fourteen, (14,) and the south fraction of section number fifteen (15,) and the west half of the northwest quarter of section twenty-four, (24,) all in township number three (3) south, of range number seventeen (17) west, according to the United States survey, in Michigan. Also, all the power and authority of said parties of the first part or their heirs to erect and continue a dam across the Paw
573 Paw river, in the county of Berrien, in section twenty-three (23,) township three (3) south, range seventeen west; together with all privileges, rights, and franchises, subject to and under all the provisions, requirements, and restrictions, by authority and act of the legislature of the State of Michigan, approved M'ch 16, 1849, being the same premises conveyed or caused to be conveyed to said parties of the first part by said party of the second part and his wife, and these presents are given to secure the payment of part of the consideration money of the said premises.

N. BACON, *Circuit Judge.*

Filed Oct. 12, 1858.

WILLIAM S. MERRILL, *Register.*

STATE OF MICHIGAN:

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBURY, MARY R. MEDBURY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

To the circuit court for the county of Berrien, in chancery.

In pursuance and in virtue of a decree of said court, entered in the above cause the 12th day of June, A. D. 1858, by which it was ordered that it be referred to the circuit court commissioner in and for said county to ascertain and report to this court the situation of the mortgaged premises described in the bill of complaint filed in this cause, and whether the same can be sold in parcels without injury to the interests of the parties; after due and diligent personal examination of said premises, the hearing of affidavits of various persons living near and upon the same, I, Charles Jewett, the said commissioner, residing in said county of Berrien, do respectfully certify and report to this court, as in said order and reference directed; said examination being by me made in person on said premises on the 14th, 15th, and 16th days of June instant.

574 Said mortgaged premises I found to be what is commonly known as the "Watervleit mill property," and are all situated in Watervleit, Berrien county, and in the adjoining township of Hartford, in Van Buren county. They were selected for, and have been, and are now principally used as a lumbering establishment. Upon said premises, lying in said Watervleit, is a large and extensively-improved water power, at the confluence of, and upon the Paw Paw river and Mill creek. The water of both streams are used for the power; the main dam, authorized by an act of the legislature, being on the river, raises and causes the water to set back into the Paw Paw lake, so called, thus elevating, covering somewhere about two thousand acres, from two to three feet in height above the common low water mark, as near as I could conveniently ascertain, from persons who live near the premises.

From said dam across a bend in the river a large mill-race has been made at great expense; it is about one-half mile in length, capable of conveying a large amount and volume of water, and also of storing a great number of logs in the same. On this mill-race, upon the S. W. fractional quarter of section 23, T. 3, R. 17 W., are situated the Watervleit mills. The saw mills, which are all united together and one concern, and contain over one hundred working saws, capable of sawing from the logs, and getting for the market easy of access to the same by way of said river Paw Paw, from fifty to one hundred thousand feet of lumber for 24 hours, and are the principal purpose, business, and value of this property, all else of this property seeming to be at present only conveniences and necessaries to carry the same on successfully. Above these mills and on the same race is a grist mill of two runs of stones, and a corn cracker; this mill giving evidence of having been substantially made and nicely fitted up in its interior department. It has been badly damaged and neglected, and is now in a very bad condition. For a more particular description of its condition and value, I refer to the affidavit of John Hodgson, the miller, hereunto annexed, marked "Exhibit A," and made a part of this my report, and which fully agrees with my own observations. Near these mills on said mortgaged premises,

575 are several buildings, mostly in a depreciating, dilapidating, and seemingly but little cared for state and condition. There are on said premises a store, tavern, and boarding-house. One other boarding-house, and several other tenement houses, barns, outhouses and sheds for the workmen necessary to carry on their works. Around the mills are, perhaps, one hundred acres of said mortgaged premises, cleared off, occupied principally for raising vegetables, hay, and pasturage for the hands and team working the mills and lumber yard, &c., &c.

A few parcels of these lands out of these premises were sold by former owners to mechanics, laborers, &c., &c., cheap tenements erected thereon; the balance of these premises are all heavy timbered lands; about 600 acres of which, including all in Hartford, and one lot in Watervleit, are, or were, when said defendants took possession of them, as I was credibly informed, valuable pine lands, and contain

about all of the pine in that vicinity, or that can conveniently come to their mills. There are also oak, ash, whitewood, and other sawing timber on the lands. I was informed that the sawing timber on these lands had been usually carefully preserved by previous owners, only to use on special and necessary occasions, when suitable logs or timber were not on hand, or could not be had at the time to fill some special bills. I notice by the newness of the choppings, and other evidences, there had of late been considerable strip and havoc made among this valuable timber. Most of the lands in Watervleit adjoining, adjacent to, and indispensable to the proper use and improvement of the water power, and the convenient and necessary working of such an establishment. The timber from the outlands, which are all on or near the river above said mills, seem to be all important and highly necessary for stocking them, when it so happens that proper stock cannot otherwise be had for that purpose. It is clear such a water power is only or mainly valuable at present for such an establishment, which would be of far less value were the owners to rely on the uncertainty of stocking them by purchases, while the timber would be of far less value to those having no mills to cut it up for market. Hence I am of the opinion, and so certify and report, that said mortgaged premises cannot be divided and sold in parcels without
576 great injury to the interests of the parties. To show more particularly the nature and condition of said mortgaged premises, their hazard, want of proper care and attention, the strip, waste, and damage done by bad management of the same. I refer to the affidavits hereto annexed, exhibit "A," and were made by some of the most substantial and credible citizens living near to, and being well acquainted and familiar with said premises, and the greater share of the statement of said affiants, I found to be true on personal examination of the premises, and from what I heard from other persons acquainted with it and its condition. All which is respectfully submitted.

Dated June 18, 1858.

CHARLES JEWITT.

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
MEDBERY *et als.*, defendants.

STATE OF MICHIGAN, *Van Buren County, ss:*

Burrill A. Olney, of Hartford, in said county, being duly sworn, deposeth and says, that he is of the age of forty-six years, and has resided in said town twenty years and upwards; that he is a farmer. Deponent further says, that he has been the supervisor of said township, and assessed by virtue of his office the real and personal property thereof four or five times during his residence in said town. This deponent is well acquainted with the land described in a certain mortgage dated April 14th, 1855, and executed by John W. Med-

bery and Mary R. Medbery, James F. Aldrich, and Eleaner C. Aldrich, to Isaac N. Swain, of Berrien county, Michigan, and lying in town. three south, range sixteen west, in said Van Buren county; the said lands are generally timbered with pine, the most of which may be considered valuable pine timbered lands. Deponent is well acquainted with what is known as Swain's mill property, at Watervleit, in Berrien county, which has been in possession of aforesaid Medbery and Aldrich since the fall of A. D. 1854; he has been to said grist and saw mills more or less for the last twenty years for purpose of getting grain ground and lumber sawed. A new grist and saw mill have been erected on said premises within the past ten years. From the nature of the water power and the structure thereof, the mills being on a sandy foundation with wood fixtures, there is great danger of the mill property being destroyed, without great care being exercised over it. Said mills are on the Paw Paw river, the race from the dam to the said mills being one hundred rods or upwards. There was a waste weir on said race when said Swain gave possession of said mill property to said Medbery and Aldrich, which has been closed up since said property came into possession of the last named parties. In sudden and heavy rain storms deponent has seen the water wash over the race, and finally washed it out to a great depth ; this happened in June, 1867, when Medbury and Aldrich were in possession. The grist and saw mill are run by the agents or servants of said last named parties. The last named parties have not been at Watervliet, at and about said mills but a few days at a time since the fall of 1854. Deponent further says that with his knowledge of all above described real estate in Van Buren and Berrien counties, that he thinks a sale of said out lands and mill property separately, would not realize over two-thirds the sum of money as a sale of all of it together.

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(Signed) BURRELL A. OLNEY.

Subscribed and sworn to before me, June 14, 1858.

CHARLES JEWELL,
Notary Public, Van Buren Co., Mich.

STATE OF MICHIGAN, *Van Buren County ss:*

Martin Ruggles, of Hartford, in said county, being duly sworn, deposeth and says, that he is of the age of thirty-five years, and has resided in said town upwards of eighteen years last past; that two years prior to 1858 he was supervisor of said town, and is now supervisor of said town; that by virtue of said office he has assessed the real and personal property of said town.

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Deponent further says that he is and has been well acquainted with the real estate in said Hartford, referred to in the foregoing deposition of Burrill A. Olney—nearly all of said lands are first quality of pine timbered lands in the vicinity of the river Paw Paw, and easily got to the saw mill at Watervliet, which are about four miles below and on the same river.

All of said lands are on or near the bank of said river and logs are

got down to Watervliet with ease. The lands furtherest from Watervliet are about 5 miles, and the nearest about 2 miles. They are nearly all the pine lands on or near Paw Paw above said mills; deponent lives near these lands: deponent also has known for the past eighteen years the mills, and mill power formerly owned by Isaac N. Swain at Watervliet, and for the past three years and upwards in the possession of Medbery & Aldrich referred to in the deposition of Olney. The agents and servants of said Medbery & Aldrich have cut a very large quantity, and the best quality of the pine timber on said pine lands and taken the logs to the Watervliet mills aforesaid. This affiant is a carpenter and joiner, worked in said trade in the mills at Watervliet, when in the possession of said Swain, he has also worked in the saw mills since it went into the possession of said Medbery & Aldrich.

The waste weir on the mill race referred to by Olney has been closed up since the property went into the possession of Medbery & Aldrich. The waste weir should have been kept to discharge the water, when the river is swollen above the mills. In June, 1857, the water on a sudden rise broke through said race above the mills, carrying away not far from seventy feet, and dug out the earth on a part of the race, below the bed of the race bottom. Great care and attention has to be paid to the dam race, and the water near the mills in times of high water to preserve said works; and when the water is low, constant care and attention has to be bestowed to the water power generally to preserve the same from damage.

The bottom of the race and the foundation of the grist and saw mills are sandy. The race is about one hundred rods long.

Owing to the soil in and about the water power being sandy
579 it requires great caution to prevent the water running over or through the embankment, and in case it does run over and through the embankment it is liable to do great damage. During the time I worked at the mills for Medbery & Aldrich, in my opinion, there was not due and proper care taken of the property to prevent it from damage. There seems to have been an improvident waste and want of care to the property in general. The proprietors of the real estate do not reside in the State of Michigan, nor have they paid particular personal attention to the property, the same having been carried on by agents and hirelings. I do not think all the real estate is worth as much at this time as at the time Swain gave the possession to Medbery and Aldrich, thus calling the times equally. The property cannot be sold in separate parcels to the interests of all parties concerned as well as to sell it together.

(Signed) MARTIN RUGGLES.

Subscribed and sworn to before me, June 14, 1858.

CHARLES JEWETT,
Notary Public, Berrien County, Michigan.

STATE OF MICHIGAN, *Berrien County ss:*

Sebastian Smith, of Watervliet, in said county being duly sworn, deposeth and says, that he is thirty-two years of age; that he was

born in the State of Maine, and had in said State and New Brunswick, much experience in the manufacturing of lumber and mercantile business.

Deponent understands the carrying on of said business, the operations of the mills, and other matters connected therewith.

Deponent went in to the employ of Medbery & Aldrich at Watervliet, in the month of November, 1854, and remained with them about two years thereafter, and after the first six months employment for said parties, deponent went into the mills which said parties purchased of Isaac N. Swain, and was engaged in their lumber business in general, until I left them, since which time I have been in the lumber business at said town on my own account.

Deponent is well acquainted with the mill property, and
580 everything pertaining to the same of said Medbery & Aldrich, at Watervliet. The race from the dam to the mills is a hundred rods in length or more. The embankments of the dam and race, the foundations of the mills and hydraulic fixtures are sandy.

If water gets the advantage of them, either in running over, or in making a breach through or under the same, it is almost sure to cause a great deal of damage; such has been the case since Medbery & Aldrich had the possession of said mill property. At the time they took said property, there was a large waste weir in the race embankment, which they have closed and destroyed and built no other, and can now only draw the surplus water that used to escape through the waste weir, through the water wheels, and over and through the flumes, which is not only difficult, but sometimes impossible to accomplish, such practice is dangerous and injurious to the works. A large waste weir in the race above the mills is of very great necessity and important for the safety of the property. There should be headgates at the upper end of the race at or near the point where the water flows from the dam and pond into the race; the headgates that were there formerly have gone out and are destroyed.

Should a breach happen in the race or at the mills, there is nothing to prevent the immense flowage of near 2,000 acres of lake and river from two to three feet deep above the natural level of the stream and lake, and situate above the dam and race, through the break, which might, if contiguous to the mills, destroy them, or render them of little or no value. Medbery & Aldrich have not had personal oversight over the property, nor have either of them been at Watervliet but a few days at a time since they had possession of the same; the business has been attended to by their agents and servants. That there has been strip, destruction, and unusual waste. Also that they and their employees have done great damage to it and the public by obstructing and injuring the navigation of the Paw Paw river for miles below said mills, by means and on account of throwing the offal of such an establishment into it such as slabs, edgings, bark, chips, &c., causing thereby also an impure and unhealthy effect.

Much of such fixtures, about said works are now decayed or tender
and unsafe, by reason of decay, and need to be restored or
581 repaired, which, if not done in improper time, may cause

much damage to the property. Although said Medbery & Aldrich have built a large saw mill, and done some other work on said property, I am of the opinion, and it is my judgment in view of the strip, waste, decay, destruction, &c., hereinbefore referred to that said property altogether is not as valuable nor worth as much (provided the times were equal) now, as when said Medbury & Aldrich purchased the same of said Swain. And furthermore, I do not think or believe said property can be sold in separate parcels for the interest or advantage of the parties concerned, so well as to sell it together, meaning the entire property purchased by said Medbery & Aldrich of said Swain, in the year 1854, and situate in Berrien and Van Buren counties.

SEBASTIAN SMITH.

Subscribed and sworn to before me, June 15, 1858.
CHARLES JEWETT,
Circuit Court Commissioner.

BERRIEN COUNTY, *ss:*

Henry R. Holland, of Watervliet, of said county being duly sworn, deposeth and says that he is thirty-six years of age, and has resided in said town since the year 1848, that he is a merchant and miller, and engaged in the lumber business. He is acquainted with Isaac N. Swain, complainant, and John W. Medbery and others, defendants in the cause pending in the circuit court in Berrien County in chancery, and is also acquainted with the property described in a certain mortgage executed by said Medbery and others to said Swain and dated April 14, 1855, which said property said defendants Medbery & Aldrich purchased of said complainant, in the fall of the year, A. D. 1854; that he has heard read the depositions of Sebastian Smith hereinbefore contained, made and sworn to before Charles Jewett, circuit court commissioner. That all the statements therein contained, concerning said property, of its want of proper care, of its condition in general, of the stock, waste, and destruction, and bad management in particular, are all true of my own knowledge.

That the entire property, together with all that has been done to, or on it, is of considerable less value than when purchased of
582 said complainant.

With proper care and management, it is altogether a good and valuable property, and am of opinion that if the same be sold together, it will bring one-third more than if sold separately and in parcels.

HENRY R. HOLLAND.

Subscribed and sworn to before me, June 15, 1858.
CHARLES JEWETT,
Cir. Court Com'r.

James W. Lindsley, of the town of Watervliet, in the county of Berrien, being duly sworn, deposes and says, that he is thirty-nine years of age, resided in said township for the last six years, and is a

practicing physician; this affiant has heard read the deposition of Sebastian Smith, made the 15th day of June instant, and sworn to before Charles Jewett, circuit ct. com'r; that he is acquainted with Isaac N. Swain, John W. Medbery, and James F. Aldrich, and is well acquainted with the property described in a mortgage deed from Medbery & Aldrich to said Swain, dated April 14, 1855; that said property of said Swain, by said Medbery & Aldrich, in the fall of 1854; that all the statements set out in the said deposition of said Smith, concerning said property, of its want of proper care of its condition in general, of the strip, waste, and destruction, also the bad management of it, in particular, are all true of my own knowledge; that the entire property together with all that has been done to, or on it, is of considerable less value than when purchased of said Swain.

It is a valuable property, and with proper care and attention can be kept so; and I am of the opinion that if the same be sold together it will bring one-third more than if sold in separate parcels. Deponant further says, that in consequence of throwing slabs, edgings, barks, chips, &c., &c., from said saw mill into the river, it clogs up the current, causing sickness in the vicinity, and in consequence of such sickness it is a damage to said property.

JAMES W. LINDSLEY.

Subscribed and sworn to before me, June 15, 1858.

CHARLES JEWETT,
Cir. Ct. Com'r.

583 John C. Lamb, of the town of Watervliet, in the county of Berrien, being duly sworn, deposes and says, that he is forty years of age, has resided in said town four years last past, and is a practicing physician. Affiant is acquainted with Isaac N. Swain, John W. Medbery, and James F. Aldrich, and is well acquainted with the property described in a certain mortgage, executed by said Medbery & Aldrich to Swain, and dated April 14th, 1855, which property was sold by said Swain to said Medbery & Aldrich in the fall of 1854. This defendant has heard read the affidavit of Sebastian Smith and sworn at this date, before Charles Jewett, cir. ct. commissioner. That all the statements therein set out, concerning said property, of its want of proper care, of its condition in general, of the strip, waste, destruction, and bad management in particular, are all true of his own knowledge. That the entire property, together with all that has been done to, or on it, is of considerable less value than when purchased by Medbery & Aldrich. It is a valuable property, and with proper care and attention to it, it can be kept so; and I am of opinion that if the same be sold together, it will bring one-third more than if sold in separate parcels; that in consequence of throwing the offal of the saw mill into the Paw Paw river it has obstructed the flow of the water many miles below the the said mills;

this obstruction to the current causes sickness, which is a damage to the said property.

JOHN C. LAMB.

Sworn and subscribed to before me, June 15, 1858.

CHARLES JEWETT,
Circuit Court Commissioner.

Endorsed: Exhibit "A" "A," referred to in annexed report.

CHARLES JEWETT,
Cir. Court Com'r.

John Hodgson, of Watervliet, in Berrien county, being duly sworn, says that he is of the age of thirty-four years, and has resided in said town for the last ten years with the exception of about eighteen months when he lived in the adjoining town of Hartford. He came to Watervliet in the fall of 1848; he is a practical miller, and considers himself conversant with the operations and carrying on of a flouring or grist mill; he has known the mill property formerly owned and occupied by Isaac N. Swain, and now in the
584 possession of Medbery & Aldrich, in Berrien and Van Buren counties.

Deponent has been the miller in the grist mill situate and drawing water from the same race which supplies the water for the power to the saw mills on the mill property aforesaid, since the same commenced operations in the month of November, in the year A. D. 1849, with the exception of some eighteen months, he ran said mill for said Swain, and is now and has been running the same for Medbery & Aldrich for the two years next July. Said grist mill, which I attend, is so undermined and settled out of its proper place, the timbers so decayed and giving away, and without proper repairs being made, and the machinery in the same, so injured and damaged on account of being run when thus thrown out of their proper line and place, that I do not think the value of the same is more than one-third what it was when Medbery & Aldrich purchased the property of said Swain, and took possession of it. A large share of the damage to the grist mill has been occasioned on account of the want of a proper waste weir in the race, to control the height, overflow, and under pressure of the water. I also know much other damage to the saw mills growing out of the same cause; there are no head gates to the race as formerly, the same having been destroyed since in the possession of Medbery & Aldrich, which render the mill property exposed to immense damage. So much offal has been thrown into the river by them, it has dammed the same up, setting the water back into the wheels, and thereby depreciating the strength and value of the water power, as well as obstructing the navigation of the river, which is a great deteriment in the transportation of lumber from these mills to market, and on that account, lessening the value of this property. Taking into account all the improvements made by Medbury & Aldrich on the mill property, the depreciation and damage to the same for the want of proper care and attention,

the mills and water power are not worth as much at this time as at the time it was purchased by them of Swain.

It is for the interests of all parties concerned in the property to sell it together, and not in separate parcels.

JOHN HODGSON.

584 Subscribed and sworn to before, June 15, 1858.

CHARLES JEWETT,
Circuit Court Commissioner.

I certify that the above and foregoing affidavits were taken and subscribed at their several dates.

CHARLES JEWETT,
Cir. Ct. Com'r.

Filed, July 31, 1858.
(Signed) WILLIAM S. MERRIL, *Register*

STATE OF MICHIGAN:

The Circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN N. MEDBERY, MARY R. MEDBERY, JAMES F. Aldrich, and Eleanor C. Aldrich, defendants.

At a session of said court, held at the village of Berrien, in the county of Berrien, on the twelfth day of June, in the year one thousand eight hundred and fifty eight. Present, Hon. NathanielBacon, circuit judge.

This cause came on to be heard upon the complaint and answer therein filed, and it appearing to this court that there was actually due to the said complainant, at the date aforesaid, for said principal and interest, the sum of seven thousand and six hundred dollars and ninety-three cents; and that the amount secured by and unpaid upon said bond and mortgage, including interest thereon, to the date aforesaid, is the sum of thirty-four thousand and eighty dollars and ninety-seven cents. And it further appearing that other sums may become due and arise to said complainant, by reasons of moneys advanced, or hereafter to be advanced by said complainant to secure the insurance of the premises from losses by fire, and also for the payment of taxes assessed and levied upon said premises: on motion of F. Muzzy, esq., solicitor for the complainant, it is ordered, adjudged, and decreed, and this court by virtue of the authority therein vested, doth order, adjudge, and decree, that the said defendants,

John W. Medbery and James F. Aldrich, pay or cause to be
585 paid to the said complainant, the amount so found to be due as aforesaid, together with the interests and costs, on or before the ninth day of October, in the year one thousand eight hundred and fifty-eight.

And it is further ordered that this cause be referred to the circuit court commissioner in and for said county, and that he ascertain and report to this court the situation of the mortgaged premises, and whether the same can be sold in parcels without injury to the interests of the parties.

And it appearing to this court that upon filing the bill of complaint in this cause, an injunction was issued out of, and under the seal of this court, among other things enjoining and restraining said defendants, their agents, servants, and employees, from cutting any timber or committing any waste upon said mortgaged premises.

On like motion it is therefore further ordered, that such injunction remain firm and effectual, and that the said defendants, their agents, servants, and employees, are hereby commanded to absolutely desist and refrain from cutting, severing, or carrying away any trees or timber from, and from committing any waste upon the said mortgaged premises, the buildings, fixtures, or appurtenances thereof, until the further order of this court.

(Signed) N. BACON,
Circuit Judge.

Filed June 14, 1858.
(Signed) WM. S. MERRILL,
Register.

STATE OF MICHIGAN:

Circuit court of the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich.

It is hereby stipulated by and between the parties of the above-entitled cause, that the said cause may be heard at the present term of this court on the pleadings, and the said complainant have such decree as he shall be entitled to upon said pleadings, except that no
586 decree for an injunction shall be made—the said complainant hereby waiving the any right to such decree. And it is further hereby stipulated that a motion may be made before the judge of the said circuit court, at his chambers, on the eighteenth day of June inst., by the said defendant, to dissolve the injunction heretofore granted in said cause, the injunction to remain as at present till that motion be granted.

F. MUZZY,
Solicitor for Complainant.
J. B. GREENOUGH, *Att'y*,
per Mr. JUDSON.

Filed June 11, 1858.
(Signed) WM. S. MERRILL, *Register.*

ISAAC N. SWAIN
vs.
JOHN W. MEDBERY AND HIS WIFE, and JAMES F. Aldrich and his wife.

In the circuit court of the county of Berrien, and State of Michigan, in chancery, for foreclosure of mortgage made and executed by said defendant to said plaintiff, on the 14th day of April, 1855, and recorded in the register's office in said county, on the day of , 1855, at hours, m., in book of mortgages, on pages , this is claimed to be unpaid, now due and not due, as follows:

Amount of principal unpaid, Sept. 28, '56, the sum of	$30,000 00	
Interest on the above, 1 year from Sept. 28, '56, to Sept. 28, '57, at 7 per ct., is		$2,100 00
Third instalment due, Sept. 28, '57, is		5,000 00
		7,100 00
Interest on this $7,100 00, 8 mos. 14 days from Sept. 28, '57, to June 12, '58, at 10 per ct., is		500 93
Amount claimed to be due and unpaid, June 12th, 1858, is		7,600 93
Amount of principal unpaid, to become due with interest annually, was on Sept. 28, '57		25,000 00
Int. on this $25,000 00, 8 mos. 14 days from Sept. 28, '57, to June 12, '58, at 7 per ct., is		1,232 38
Amount of premium and charges paid R. C. Paine for insurance, Oct. 10, '57, was		236 50
Interest on this $236.50, 8 mos. and 2 days from Oct. 10, '57, to June 12, '58, is		11 16
Total amount due, and not due and unpaid, June 12th, 1858		$34,080 97

587 Berrien cir. ct.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
MEDBERY & ALDRICH, def'ts.

Cir. ct. com'rs' bill.

122 Rules.	Attending on, hearing, and for injunction	$1 00
	Allowing "	1 00
	Entering same on register	1 50

1858.

June 14, 15, & 16.	Going to Hartford, Van Buren county, Watervliet, 3 days, at $6 per day, to take testimony by order of court	18 00
	To ~~living~~, hire, and expenses on same	8 25
17 & 18.	Two days engaged on drawing report	10 00
	Taking testimony, 61 fol	12 20
	Engrossing same, 6 cts. per fol	3 66
	Administering and certifying 7 oaths	1 75
	Dr. report, 32 folios, 13 cts. each	4 16
	Dr. engrossing copy, 6 cts. each	1 92
		$62 44

BERRIEN COUNTY, *ss:*

Charles Jewett, of said county, being duly sworn, says he is circuit court commissioner of said county; that above bill of items and number of days engaged were performed in said cause; that deponent believes the charge per day for services is just; that bill and item for living, hire, and expenses were actually paid in going to Hartford, Ct., on said business.

CHARLES JEWETT.

Sworn and subscribed before me, August 25, 1858.

BENJAMIN F. FISH,
Notary Public.

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
588 JOHN W. MEDBERY, MARY R. MEDbery, James F. Aldrich, and Eleanor C. Aldrich, defendants.

At a session of said court held at Berrien, on the twenty-second day of January, one thousand eight hundred and fifty-eight. Pres't, Hon. Nathaniel Bacon, circuit judge.

This cause being at issue as to all the defendants, and more than ten days having elapsed since said cause was brought to issue,, and no notice having been given by either party of their intention to examine witnesses in open court: on motion of F. Muzzy, solicitor for the complainant, it is ordered that the parties produce witnesses in this cause within sixty days after notice of this order.

Filed January 23, 1858.

(Signed) WILLIAM S. MERRILL,
Register.

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

The replication of Isaac N. Swain, complainant, to the joint and several answer of John W. Medbery, Mary R. Medbery, James F. Aldrich, and Eleanor C. Aldrich, defendants.

This repliant, saving and reserving to himself now and all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for application thereto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient, in the law, to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant without that; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct; and humbly pray, as in and by his said bill he has already prayed.

F. MUZZY,
Sol'r for Complainant.

Filed December 30, 1858.

WM. S. MERRILL, *Register.*

589 STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James P. Aldrich, and Eleanor C. Aldrich, defendants.

The joint and several answers of John W. Medbery, Mary R. Medbery, James P. Aldrich, & Eleanor C. Aldrich, defendants in the above entitled cause to the bill of complaint of Isaac N. Swain, the complainant, therein filed in the said cause. These defendants now and at all times, saving and reserving to themselves all benefit and advantage of exception, to the many errors and insufficiencies in the said complainant's said bill of complaint, contained for answer thereto, or to so much and such parts thereof, as they are advised it is material and necessary for them to make answer unto, answering, say. That they admit, that on or about the fourteenth day of April, A. D. 1855, the said defendants, John W. Medbery, James F. Aldrich, did execute and deliver unto the said complainant their bond of the date in the said bill of complaint, stated in the sum of eighty-four thousand dollars, conditioned for the payment by them, or their heirs, executors or administrators, of the sum of forty-two thousand four

hundred dollars, in the manner and at the times, and in the payments and proportions as stated and set forth in the said bill of complaint; but whether the said bond, so executed, contained such, or any covenant or condition, to keep any portion of the property described in a certain mortgage executed by the said defendants, as collateral security to said bond, insured for the benefit and security of said complainant, or such or any covenant and condition to abstain from any waste of the premises described in said mortgage, as stated and set forth in said bill of complaint; these defendants say, that they have no knowledge, recollection or belief, and can neither admit nor deny, but leave the said complainant to make such proof as he shall be able.

And these defendants, further answering, admit that on the same day of the date and execution of the said bond, and for the purpose of securing the performance of the condition of the
590 same, they did execute and deliver to the said complainant, a mortgage of certain lands and tenements thereon described, and that the said mortgage was afterwards, and at the times and in the manner stated in said bill of complaint duly acknowledged and recorded, but whether the description of lands contained in schedule (A,) attached to said bill of complaint, and therein alleged to be the same contained in said mortgage is in all respects accurate and correct, these defendants say that they are unable, from recollection to state, and therefore neither admit nor deny, but refer to the said mortgage and the record thereof, referred to in said bill of complaint for greater certainty, as to said description.

And these defendants, further answering, admit that the said mortgage was subject to substantially the same conditions as the said bond to which it was collateral, and that it was given to secure the same sum of money mentioned in the condition thereof, but whether the said mortgage contained such or any conditions to insure said property or any part of it for the benefit of the said complainant, or against waste, as stated and set forth in said bill of complaint, these defendants cannot from recollection now state, but for greater certainty refer to the said mortgage and the record thereof, referred to in the said bill of complaint.

And these defendants, further answering, admit that one of the annual payments of principal and interest payable on the said bond remains due and unpaid; but whether the same amounts to the sum of seven thousand one hundred and seventeen and 50-100 dollars, as stated in said bill of complaint, they cannot state, but for greater certainty, refer to the condition of the said bond and mortgage when produced.

And these defendants, further answering, admit that ~~no~~ insurance has been effected by them on the said mortgaged property in the name or for the benefit of said complainant.

And these defendants admit, that there are some back taxes unpaid on some parcel of the land described in the said mortgage, but deny that any considerable amount of taxes remain unpaid on the same, or that their delay to pay the said taxes in any respect,
591 lessen or impair the security of the complainant.

And these defendants, further answering, admit that at same time after the execution of the said bond and mortgage, the said defendants, Medbery & Aldrich did enter into an article of co-partnership with one Jonathan S. Stewart, for the purpose of manufacturing lumber, but deny that the said contract contained any provision, that said Medbery & Aldrich should furnish logs for two millions of feet of lumber annually from said land.

And these defendants, further answering, admit that they have caused timber to be cut and taken from said land, and that at the time of the filing of the said bill of complaint, they were causing timber to be cut and carried off from said lands; but they deny that they have ever committed, or suffered or permitted any waste upon said lands, or that by the cutting and removing of timber therefrom, the said complainant's security for said mortgage debt has been diminished, or that said security is either slim or insufficient to secure the complainant

And these defendants, further answering, say, that heretofore, and on or about the twenty-sixth day of September, A. D. 1854; the said complainants, being or pretending to be, the owner of said mortgaged premises, entered into an agreement or contract in writing with the defendants, John W. Medbery and James F. Aldrich, for the sum of fifty thousand dollars, payable as follows: Ten thousand dollars on the delivery of said contract, or within ninety days thereafter with interest, and the balance in eight equal instalments. And that in and by said contract, it was agreed between the said complainant, and the said John W. Medbery and James F. Aldrich, that upon the payment of the said ten thousand dollars, and within ninety days thereafter, said complainant agreed to execute, or cause to be executed to the said defendants, John W. Medbery and James F. Aldrich, a good and sufficient conveyance of said lands, and the said last named defendants were thereupon to execute to the complainant their bond and mortgage upon said premises to the complainant, to secure the payment of forty thousand dollars; that being the balance of the purchase money, according to the terms of said contract.

And these defendants, further answering, say, that among
592 other things, it was agreed in and by said contract, that there should be no unreasonable strip, or waste upon the said premises faster than the purchase money was paid, so as in any wise to impair the security.

And these defendants, further answering, say, that the said John W. Medbery and James F. Aldrich, afterwards paid the said sum of ten thousand dollars, and, therefore, on the fourteenth day of April, A. D. 1855, the said defendant, in accordance with the provisions of said contract, executed their bond and mortgage on said premises to the complainant, which is the same bond and mortgage mentioned and set forth in said bill of complaint.

And these defendants, further answering, say, that at the time of the purchase of said lands from the complainant, as set forth herein, and for a long time previous thereto, the complaint had used the said land for the purpose of cutting the timber therefrom, and manu-

facturing the same into lumber, and for that purpose had erected a saw mill thereon, and that the legitimate use of said premises was the manufacture of lumber, as aforesaid: and these defendants say, that at the time of said purchase, it was well understood by and between the parties, that the same was purchased by the said John W. Medbery and James F. Aldrich, for the purpose of cutting timber therefrom, and manufacturing and selling timber from the same, and that at the time of said purchase, the said complainant represented to the said John W. Medbery and James F. Aldrich, that there was at that time standing and growing on said lands, sufficient pine timber to make fifty millions of feet of lumber, and these defendants say, that as near as they can now estimate the same, there was at that time sufficient timber to make between twenty-eight and thirty million feet of lumber.

And these defendants, answering, say, that they have cut on said premises, since the said purchase of the same, sufficient timber to make about three million, six hundred and twenty-five thousand feet of lumber, and no more, and they have manufactured the same, or most of it into lumber, and disposed of the same, and that
593 during the same time they have built a saw mill on said premises with three gangs of saws, each capable of containing thirty saws, which said mill and the accompanying machinery cost, and is now worth the sum of thirty thousand dollars; and that they have made improvements upon another mill thereon, and other permanent improvements on said premises of the value of five thousand dollars, and that said premises are now worth, at least, the sum of eighty-five thousand dollars.

And these defendants further answering, show that they have paid on the principal sum of said purchase money, the sum of twenty-two thousand and four hundred dollars, and on account of interest accruing on said purchase money, the sum of about seven thousand and six hundred dollars. And these defendants further answering, say that since the said purchase, and since the making of the said bond and mortgage they have been regularly employed in manufacturing lumber, from the timber on said premises, and that the said complainant, has at all times been cognizant of, and had notice of the same, and has made no objection thereto, until the commencement of this suit, and these defendants insists, that inasmuch as they have paid more than two fifths of the purchase money, for said premises, that by a fair and equitable construction of said contract of purchase, and said bond and mortgage, they are entitled to have taken from said lands, at least timber enough to make twelve millions of feet of lumber, without being subject to a charge of stripping or waste of said premises. And these defendants further answering say, that a copy of said contract of purchase, except so much thereof as contains a description of the said premises and lands, is hereto annexed marked schedule (A,) and these defendants pray that the same may be deemed and taken as a part of this their answer. And these defendants deny all and all manner of unlawful combination and confederacy charged against them in said bill of complaint, and humbly

pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JAMES F. ALDRICH.
594 J. VAN ARMAN, *of Counsel.*
JAMES B. GREENOUGH,
Sol'r for Def'ts.

STATE OF MICHIGAN, *County of Calhoun:*

On this twenty-fourth day of December, A. D. 1857, before me personally appeared the above named James F. Aldrich, and made oath that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge except as to these matters therein stated on information and belief, and as to these matters he believes them to be true.

WILLIAM H. BROWN,
Notary Public for Calhoun County, Mich.

Schedule ("*A.*")

Memoranda of an agreement made in duplicate at Watervliet, in the county of Berrien and State of Michigan, this twenty-eight day of September, A. D. 1854, between Isaac N. Swain, of Watervliet aforesaid, as party of the first part, and John W. Medbery, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the State of Illinois, of the second part, witnesseth as follows, to wit:

I. The party of the first part agrees to sell to the party of the second part, all these certain pieces or parcels of land, with the fixtures and appurtenances thereunto belonging, situate, lying and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, to wit: also, it is understood and agreed as aforesaid, that the use and occupancy of the house, outhouses, and fixtures and premises enclosed therewith, where said Swain now resides with his mother, brother, and sisters, is excepted and reserved, by said Swain for his benefit for one year from date hereof, then to be fully complete and surrendered with the premises above conveyed, and also the use and occupancy of the shop building and fixtures connected with the same, which Russell Swain,
595 a deaf mute, now occupies together with the use of the water as now used, or in a similar way so long as said Russell Swain chooses or desires, and shall occupy the same, free of any rent, let or unnecessary hindrance, otherwise than if in the way of other important improvements, may be removed sufficiently to be reasonably out of the way, and where he can have the same use and privileges as before, and when said Russell Swain is done with it, or abandons it, not to occupy any more, then this reserve is to terminate and be fully complete and ended.

II. The parties of the second part for themselves, their heirs, executors, administrators and assigns, agree to pay to the party of the first part for the lands above described and not reserved from this

sale, with the rights, privileges and appurtenances thereunto belonging, the just and full sum of fifty thousand dollars, (50,000 00,) in the manner following, to wit: Ten thousand dollars (10,000 00,) on the delivery of this contract or within ninety (90) days from date hereof with interest and the balance of forty thousand dollars, ($40,000 00,) in eight (8) equal annual instalments of five thousand dollars ($5,000 00) each with lawful interest from the date hereof, to be paid annually on the whole sum remaining due or unpaid in each year at the rate of seven (7) per centum: and the said party of the second part, shall also pay and discharge all taxes from this date upon said premises hereby sold.

III. It is agreed and understood by the parties to this agreement, that after the payment of the ten thousand dollars (10,000 00,) then or within ninety days thereafter, said party of the first part, agrees to execute or cause to be executed to the parties of the second part, their heirs, or assigns, a good and sufficient warranty deed, for the said lands above described and not reserved from this sale, with the rights, privileges and appurtenances thereunto belonging, upon and at the same time, the said parties of the second part, shall execute to said party of the first part, good and satisfactory security upon the property for the amount of six thousand six hundred and sixty-six and $\frac{2}{3}$ dollars, (6,666$\frac{2}{3}$,) and also their bond and a good and
596 sufficient mortgage upon the lands above described and not reserved from this sale with the rights, privileges and appurtenances thereunto belonging, conditioned to pay to said party of the first part, the said forty thousand dollars as above stated in eight equal annual instalments of five thousand dollars (5,000 00) and interest, as above stated, and also for any amount at any time remaining over due and unpaid, the same shall be considered as merely loaned and bearing interest thereon at the rate of ten (10) per centum per annum, which interest shall also be paid annually.

It is also agreed by said parties as aforesaid that said parties of the second part shall keep an insurance in some safe insurance company upon the insurable property upon said premises for at least one third their value for the benefit and security of said party of the first part, to be paid over in case of losses to said party of the first part as payment on the purchase money, that there shall be no unreasonable strip or waste upon the premises faster than the purchase money is paid, so as to in anywise impair the securities, said party of the first part having a tax deed of the other undivided one-half of the northeast quarter of section 23, in township three, south of range seventeen west, agrees to make and execute to said parties of the second part, at the same time of giving the warranty deed of the other lands, a quit claim deed of the same, which land shall also be included in their mortgage above stated, and also to quit claim to said parties of the second part, all his rights of flowage upon any lands he may have in consequence of raising the dam on the Paw Paw river in said section No. 23 aforesaid, and also all his rights by acts of the legislature of the State of Michigan for constructing and maintaining said dam, all which grants shall be included also in the mort-

gage aforesaid, to be executed by said parties of the second part for security of the purchase money. Said Swain is to have all reasonable time and privileges to take care of and dispose of all his personal property on said premises and said Medbery and Aldrich to have possession of the mills and the new store at once, and
597 the other possessions as soon as convenient to vacate them reasonably.

In testimony whereof, the parties have hereunto set their hands the day and year first above.

(Signed) ISAAC N. SWAIN.
J. W. MEDBERY.
JAS. F. ALDRICH.
Per J. W. MEDBERY.

Whereas, in the great hurry and confusion of drawing up and completing, as supposed, the within and foregoing contract, Mr. Aldrich wishing to leave hurriedly for the purpose of taking the cars for home on Saturday evening, Sept. 30th, 1854, important items of the agreement were left out of said contract, which of right, ought to have been in. Therefore, be it known and added to the within foregoing contract, that it was agreed, and is hereby agreed by the parties to said contract, that in consideration for the building of the new store on said premises and for the materials now on hand for it, included in the items and account rendered and work and labor done to that date, there was to have been paid by said parties of the second part, to said party of the first part the further sum of two thousand four hundred dollars, in two annual instalments in one and two years from that date, with interest. It is therefore agreed by the undersigned parties to said contract, that the said amount of two thousand four hundred dollars, shall be added to the amount of the bond and mortgage within mentioned, conditioned to be paid as above stated. And it is also further agreed, that said parties of the second part. are to have the said logs now on hand belonging to the said party of the first part at what they cost him for those he has purchased in the log as per accounts of purchase, and for all others on hand, for, and at the rate of three dollars per thousand feet as usually measured, for all which said logs said parties of the second part agree to pay said party of the first part in six months from this date with interest.

Dated at Watervliet, October 2d, 1854.

(Signed) ISAAC N. SWAIN.
J. W. MEDBERY.
JAS. F. ALDRICH.
Per JAS. W. MEDBERY.

598 Filed December 25th, 1857.

WM. S. MERRILL, *Register.*

STATE OF MICHIGAN:

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, compl't,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, def'ts.

SIR: Take notice that my appearance has been entered as solicitor for the defendants in the above-entitled cause.

Dated Marshal, Dec. 26, 1857.

JAMES B. GREENOUGH,
Solic'r for Def'ts.
J. VAN ARMAN, *of Counsel.*
F. FRANKLIN MUZZY,
Sol'r for Compl't.

Mr. MUZZY:

DEAR SIR: We waive service of copy of the bill. The bill is already filed and will be served on you on Monday.

Yours, &c.,

JAS. B. GREENOUGH.

Marshal, Dec. '26.

STATE OF MICHIGAN:

Second judicial circuit.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERY, MARY R. MEDBERY, James F. Aldrich, and Eleanor C. Aldrich, defendants.

Suit pending in the circuit court for the county of Berrien, in chancery, at Berrien, on the 26th day of October, A. D. 1857.

It appearing by the affidavit of Franklin Muzzy, solicitor for the complainant in this cause, that the defendants in this cause are not residents of this State, but that the said John W. Medbery and Mary R. Medbery, reside in the State of Wisconsin, and the said James F. Aldrich and Eleanor C. Aldrich, reside in the State of Illi-
599 nois. On motion of F. Muzzy, solicitor for the complainant, it is ordered that the said defendants, John W. Medbery, Mary R. Medbery, James F. Aldrich, and Eleanor C. Aldrich, cause their appearance to be entered in this cause, on or before the 27th day of December, A. D. 1857, and that in case of their appearance they cause this answer to said complainant's bill of complaint to be filed, and a copy thereof to be served on the complainant's solicitor, within twenty days after service of a copy of said bill, and notice of this order, and in default thereof that said bill be taken as confessed by said defendants. And it is further ordered that within twenty

days, the said complainants cause a notice of this order to be published in the Niles Republican, a newspaper printed and published in said county, and that said publication be continued in said paper at least once in each week for six weeks in succession, or that he cause a copy of the order to be personally served on the said defendants at least twenty days before the time above prescribed for their appearance.

CHARLES JEWETT,
Circuit Court Commissioner.
F. MUZZY,
Solicitor for Complainant.

Filed October 26, 1857.

WM. S. MERRILL, *Register.*

STATE OF MICHIGAN, *Berrien County, ss:*

The circuit court for the county of Berrien.—In chancery.

ISAAC N. SWAIN, complainant,
vs.
JOHN W. MEDBERRY, MARY R. MEDBERRY, James F. Aldrich, Eleanor C. Aldrich, defendants.

Franklin Muzzy, being duly sworn, deposes and says: That neither of the defendants in this cause reside in this State, but that the defendants, John W. Medbery and Mary R. Medbery reside in Milwaukee, in the State of Wisconsin and the defendants, James F. Aldrich and Eleanor C. Aldrich, reside in Chicago, Illinois; that the bill of complaint in this cause was filed on the ninth day of October, 1857, and subpœna issued on the same day, directed to said
600 defendants, and made returnable the twenty-fourth day of October, 1857, and has not been personally served on account of the non-residence of the defendants; that said bill was filed by the complainant, to foreclose a mortgage upon lands in this county and in the county of Van Buren; that the Watervliet mills, so called, are upon said lands in this county, and that the agent and copartner of the defendants, Jonathan Stewart, who resides at Watervliet, has full knowledge of the filing of said bill of complaint; that said Stewart has been served with a copy of the writ of injunction issued in the cause, and at the time of the service of the same had full charge of the said mills; and, as affiant is informed and believes, on the day of the said service of said writ of injunction, which was on or before the tenth day of this month, notified said defendants, Medbery and Aldrich, of the pendency of this suit. The complainant, therefore, prays for the usual order of publication in this cause, and that the time therein set for the appearance of the defendants be at the earliest period consistent with the practice of this court.

FRANKLIN MUZZY.

Subscribed and sworn to before me, this 26th day of October, 1857.

CHARLES JEWETT,
Circuit Court Commissioner.

Filed October 26, 1857.

WM. S. MERRILL, *Register.*

STATE OF MICHIGAN, *to wit:*

The circuit court for the county of Berrien.—In chancery.

[SEAL.] In the name of the people of the State of Michigan, to John W. Medbery, Mary R. Medbery, James F. Aldrich, and Eleanor C. Aldrich, subpœna, greeting:

You are hereby commanded to appear before the circuit court for the county of Berrien, in chancery, at the court-house, in Berrien, on Saturday, the 24th day of October, instant, then and there to answer unto a bill of complaint exhibited against you, as defendant, by Isaac N. Swain, as complainant; and this you shall in
601 nowise omit, under the penalty of one thousand dollars.

Witness, the Hon. Nathaniel Bacon, circuit judge for the county of Berrien, at the village of Berrien, the 8th day of October, in the year of our Lord one thousand eight hundred and fifty-seven.

F. MUZZY,
Complainant's Solicitor.
WM. S. MERRILL,
Register.

STATE OF MICHIGAN, *Berrien County ss:*

I hereby certify and return, that after diligent search, I cannot find the within-named John W. Medbery, Mary R. Medbery, James F. Aldrich, and Eleanor C. Aldrich, in this State, and am informed and believe that John W. Medbery and Mary R. Medbery are not residents of this State, and live in the State of Wisconsin, and that James F. Aldrich and Eleanor C. Aldrich reside in the State of Illinois.

JAMES GRAHAM,
Under Sheriff.

October 24, 1857.

My fees.—Service, $; travel, $; copies, . Total, $4 50.

STATE OF MICHIGAN:

Circuit court for the county of Berrien.—In chancery.

[SEAL.] In the name of the people of the State of Michigan, to John W. Medbery and James F. Aldrich, their servants, workmen, agents, copartners, and employees, greeting:

Whereas, it has been represented to this honorable court, on the part of Isaac N. Swain, complainant, that he has exhibited his bill of

complaint in said court against you and against Mary R. Medbery and Eleanor C. Aldrich, to be relieved touching the matters therein complained of, in which, among other things, it is stated that you are cutting down, and carrying off, and stripping the timber from, and committing waste, spoil, and destruction upon the following described premises, viz: The southwest fractional quarter of section number nine; the west half of the northeast quarter of section number seventeen; the west fractional part of the southwest fractional quarter of section seven; the southeast quarter of the southwest fractional quarter of section number seven; the north half of the northwest fractional quarter of section number eighteen;
602 the southeast fraction of the northeast fractional quarter of section number eighteen; the north fraction of the northeast fractional quarter of section number eighteen, all in township three, south of range sixteen west, and in the county of Van Buren, and State of Michigan.

Also, the east half of the northeast quarter of section number thirteen; the southeast quarter of section number fourteen; the east half of the northeast quarter of section twenty-two; the southwest fractional quarter of the northwest fractional quarter of section twenty-three; the east half of the northwest fractional quarter of section number twenty-three; the northeast fractional quarter of section number twenty-three; and also so much of the southwest fractional quarter of section number twenty-three as lies north of the centre of the main public highway leading from Paw Paw, in Van Buren county, to Saint Joseph, in Berrien county, all of which last-described lands being in township three south, of range seventeen west, and the foregoing lands being mortgaged by the said Medbery and Aldrich, and their wives, to the said Isaac N. Swain, April 14th, 1855, and that your actings and doings are contrary to equity and good conscience. You are, therefore, in consideration thereof, and of the particular matters in said bill set forth strictly commanded, you, the said John W. Medbery and James F. Aldrich, and the persons before mentioned, and each and every of you, under the penalty of fifteen thousand dollars, to be levied upon your lands, goods, and chattels, to our use, that you do absolutely desist and refrain from cutting down or carrying away any trees, timber, or logs standing or lying on said premises, and from carrying away, using, or disposing of any logs that may have been cut upon or taken from said premises until this court shall have made further orders thereupon.

Witness, the Honorable Nathaniel Bacon, circuit judge for the county of Berrien aforesaid, at the village of Berrien, the tenth day of October, A. D. 1857.

WM. S. MERRILL,
Register.

F. MUZZY,
Solicitor for Complainant.

603 STATE OF MICHIGAN, *County of Berrien, ss:*

I hereby certify, and return that I served the within writ of injunction on Jonathan S. Stewart, by delivering to him a certified

copy of the annexed writ of injunction; also served on James Campbell, by reading in his hearing the original, and by showing him the seal of the court. I also further certify, that, after dilligent search, the other within named, John W. Medbery & James F. Aldrich, could not be found in the county.

this 24th day of October, A. D. 1857.

JAMES GRAHAM,
Under Sheriff.

Sheriff's fees $7 50.

Returned & filed October 24, 1857.
WM. S. MERRILL, *Register.*

STATE OF MICHIGAN:

To the circuit court for the county of Berrien.—In chancery.

Your orator, Isaac N. Swain, late of the town of Watervliet, in the county of Berrien, and State of Michigan, and now of the town of Palmer, in the county of Hamden, in the Commonwealth of Massachusetts, complaining, shows unto this court that on the fourteenth day of April, one thousand eight hundred and fifty-five, John W. Medbery, of the city of Milwaukee, in the State of Wisconsin, and James F. Aldrich, of the city of Chicago, in the State of Illinois, executed under their hands and seals, and delivered to your orator a bond, bearing date on that day, in the penal sum of eighty-four thousand and eight hundred dollars, lawful money of the United States, with a condition thereunder written, in words and figures following, to wit:

The conditions of the above obligation are such, that if the above-bounden John W. Medbery and James F. Aldrich, or either of them, their or either of their heirs, executors, or administrators, shall well and truly pay, or cause to be paid unto the above-named Isaac N. Swain, his heirs, executors, administrators, or assigns, the just and full sum of forty-two thousand and four hundred dollars, ($42,400 00) and interest annually, to be computed from the 28th day of September, 1854, and at the rate of 7 pr. ct. per annum, on all sums before due; and by stipulation it is agreed by the parties to these
604 presents, that the interest shall be at the rate of ten per cent. per annum on all sums after being due, and until payment thereof be made, all which shall be paid in way, manner, and according to the terms following, to wit:

($6,200 00) six thousand and two hundred dollars, and interest as aforesaid on the whole unpaid on the twenty-eighth day of September, one thousand eight hundred and fifty-five; and ($6,200 00) six thousand and two hundred dollars, and interest as aforesaid, on the whole sum unpaid on the twenty-eigth day of September, one thousand eight hundred and fifty-six and ($5,000 00) five thousand dollars, and interest as aforesaid, on the whole sum unpaid on the twenty-eighth day of September, one thousand eight hundred and fifty-seven; and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twentieth day of September, one thousand eight hundred fifty-eight; and ($5,000 00) five

thousand dollars, and interest as aforesaid on the whole sum unpaid on the twenty-eighth day of September, one thousand eight hundred fifty-nine; and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid on the twenty-eighth day of September, one thousand eight hundred and sixty; and ($5,000,00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and sixty-one; and ($5,000 00) five thousand dollars, and interest as aforesaid on the whole sum unpaid, on the twenty-eighth day of September, one thousand eight hundred and sixty-two; and shall and do well and truly, and duly pay and discharge, or cause to be paid and discharged, all taxes from and after the twenty-eighth day of September, one thousand eight hundred and fifty-four, on premises described in a certain mortgage indenture bearing even date herewith, executed by said John W. Medbery and James F. Aldrich, and their wives, to said Isaac N. Swain, and shall and do well and truly comply with the insurance clause contained in said mortgage indenture aforesaid, and well and truly shall not and do not commit, allow, or suffer, any strip or waste to
605 or upon said premises described in said mortgage indenture, so as to in any wise impair the securities intended to be effected by said mortgage indenture, then the above obligation to be void, otherwise to be and remain in full force and virtue.

And the said John W. Medbery and Mary R. Medbery, his wife, and James F. Aldrich, and Eleanor C. Aldrich, his wife, to secure the principal and interest mentioned in the condition of said bond, did at the same time execute under their hands and seals, and deliver to your orator a mortgage bearing even date with the said bond, conditioned for the payment of the said sum of forty-two thousand and four hundred dollars, with interrest thereon, according to the conditions of said bond, by which the said mortgager mortgaged unto your orator in fee certain lands and real estate, a description of which, taken from said mortgaged, is contained in the schedule hereto annexed, marked "A," which said mortgage was duly acknowledged, and was afterwards recorded as a mortgage in the office of the register of deeds for the county of Van Buren, on the sixteenth day of of April, in the year of our Lord one thousand eight hundred and fifty-five, in Liber "D" of Mortgages, on pages 507, 508, 509, 510, & 511, and was also duly recorded in the office of the register of deeds for the county of Berrien, on the nineteenth day of April, one thousand eight hundred and fifty-five, in Book G, of Mortgages, on pages 168, 169, 170, 171, & 172, as by the said mortgages and the certificates of acknowledgment, and of the recording aforesaid, endorsed thereon, and ready to be produced as this court shall direct, will more fully appear.

And your orators further showeth, that among the conditions of said mortgage, further and other than for the payment of several sums in said mortgage were, conditions that said parties of the first part, their heirs, executors, or administrators, shall and do well and truly and duly pay, or cause to be paid and discharged all taxes from

and after the twenty-eighth day of September, one thousand eight hundred and fifty-four, upon said premises, in said mortgage described, and shall, and do well and truly comply with the insurance clause inserted in said mortgage, and well and truly shall not, nor do not
606 commit, allow or suffer any strip or waste upon said premises, so as to in any wise impair the securities by said mortgage intended to be effected, but in case of the non-payment of the said several sums, or the interest thereon, or any part thereof, at the times so limited for the payment thereof, or of the non-payment of the taxes aforesaid, or non-fulfilment of the insurance clause, in said bond and mortgage mentioned, or in case of any strip or waste on said premises so as to impair in anywise the securities aforesaid, then it may be lawful for the party of the second , his heirs, executors, administrators, or assigns, to sell said land, all of which will more fully appear by said bond and mortgage, to which for greater certainty, your orator begs leave to refer, and to make the same and the records thereof a part of this, your orator's bill of complaint. And your orator believes and states that the sum of seven thousand one hundred and seventeen & 50-100 dollars remains due and unpaid, and that the farther sums mentioned in said bill will become due and payable as therein stated, and that no proceedings at law have been had to recover the debt secured by the said bond and mortgage.

And your orators further show that the said John W. Medbery and James F. Aldrich, nor either of them, have caused insurances to be effected according to the terms and conditions of said bond and mortgage; that he has now no insurance in the same, now operative and effective, as security to him, procured for his benefit by said Medbery and Aldrich, or either of them, nor have they or either of them procured the large saw mill to be erected, mentioned in said mortgage, to be insured for the benefit of your orator.

And your orator further shows, that the said Medbery and Aldrich have neglected to pay the taxes on said land, and that many of them have been sold for taxes, and that during this October, as your orator is informed & believes, a part of said lands have been sold for the taxes of 1856.

And your orator further says, that as he is informed and believes, that after the execution of said bond & mortgage, the said Medbery and Aldrich entered into a contract of co-partnership with one
607 Jonathan L. Stewart, and among the terms of said contract it was provided that said Stewart should take charge of said mills and share the profits of said business.

And that, as he is informed and believes, it is provided in said contract with said Stewart, as a part of the consideration therefor, that the said Medbury and Aldrich are to furnish a large quantity of logs from said land, and, as he is informed, two millions of feet annually.

And your orator further says, that as he is informed and believes, and so charges the truth to be, said parties of the first part have caused timber to be cut and taken from said land, and are now causing timber to be cut and carried off of said lands, and are suffering and permitting waste to be committed on said lands, and the same to be

stripped of valuable timber, and thereby have, and are greatly diminishing your orator's security, which your orator charges is now slim and insufficient to secure your orator. Your orator, therefore, in consideration of the premises, asks the aid of this court, and that the above-named John W. Medbery, Mary R. Medbery, James F. Aldrich and Eleaner C. Aldrich, the defendants in this suit, may appear before this court, and answer this your orator's bill of complaint, according to the rules and practice of this court, but without oath. (And your orator hereby waives the right of requiring their answers to be on oath,) and that the usual decree may be made for the sale of the said mortgaged premises, and for the payment of the amount due to your orator for principal and interest, and all sums that he may have paid, or shall pay, by reason of the failure of the said parties of the first part to perform according to the conditions aforesaid, bond and mortgage, and that said defendants, and all persons claiming under them, subsequent to the commencement of this suit, and all other parties, although not parties to this suit who have any liens, by judgment or decree, upon the mortgaged premises subsequent to the said mortgage of your orator, or any liens or claims thereon, by or under such subsequent judgment or decree, either as purchasers, incumbrances, or otherwise, may be barred and foreclosed of
608 equity of redemption in the said premises, and that the said John W. Medbery, James F. Aldrich, ——— Stewart, their agents, servants, lessees, and employees, may be restrained by an injunction issuing out of this court, from cutting timber, logs, or trees, standing or lying upon the said mortgaged premises; also from sawing, using, selling, or disposing of any logs or timber that may have been cut upon or taken from said mortgaged premises, or any part thereof, and that your orator may have such other and further relief in the premises as to this court may seem equitable.

And may it please this court to grant unto your orator the writ of injunction to be issued out of, and under the seal of this court, to be directed unto the said John W. Medbery and James F. Aldrich, to restrain and enjoin them, their servants, carpenters, workmen, and agents, from committing waste or destruction upon the premises in question, and from cutting down any timber or other trees standing or growing upon the same, and likewise from taking or carrying away any trees standing or lying upon said premises, or any part thereof, that may have been cut or taken from the same, and also from using, disposing of, or meddling with any logs that may heretofore have been cut or taken from said premises or any part thereof.

And also, may it please this honorable court to grant unto your orator a writ of subpœna, to be issued out of, and under the seal of this court, to be directed to the said John W. Medbery, Mary R. Medbery, James F. Aldrich, and Eleanor C. Aldrich, thereby commanding them, and each of them, at a certain day, and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, and perfect answers make to all and singular the premises, and further to stand and per-

form, and abide such further order and decree therein as to this honorable court shall seem meet, and your orator will ever pray.

ISAAC N. SWAIN.
F. MUZZY,
Solicitor for Complainant.

609 STATE OF MICHIGAN, *County of Berrien, ss:*

On this 7th day of October, 1857, before me, a notary public in and for said county, personally appeared Isaac N. Swain, who being by me duly sworn, deposed and said, that he had heard the above complaint subscribed by him, read, and knew the contents thereof, and that the same was true of his own knowledge, except as to matters therein stated to be on information and belief, and as to these matters and things that he believed it to be true.

EMERY M. PLIMPTON,
Notary Public, Berrien County, Michigan.

Schedule "A."

[A true copy.]

All these certain pieces or parcels of land, rights, privileges, or franchises, situate, lying, and being in the counties of Berrien and Van Buren, in the State of Michigan, known and described as follows, to wit:

One certain piece or parcel of land, being the southwest fractional quarter of section number nine, (9,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, one hundred and ninety-three and fifteen one hundredths (193 15-100) acres, more or less.

Also, the west half of the northeast quarter of section number seventeen, (17,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the west fractional part of the southwest fractional quarter of section seven, (7,) in township number three (3) south, of range number sixteeen (16) west, containing, according to the United States survey, forty-eight and twenty hundredths (48 20-100) acres, more or less.

Also, the southeast quarter of the southwest fractional quarter of section number seven, (7,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, forty (40) acres, more or less.

610 Also, the north half of the northwest fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, sixty-three (63) acres, more or less.

Also, the southeast fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, one hundred and twelve and fifty hundredths (112 50-100) acres, more or less.

Also, the north fraction of the northeast fractional quarter of section number eighteen, (18,) in township number three (3) south, of range number sixteen (16) west, containing, according to the United States survey, twenty-one and seventy hundredths (21 70-100) acres, more or less.

Also, the east half of the northeast quarter of section number thirteen, (13,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, eighty (80) acres, more or less.

Also, the southeast fraction of section number fourteen, (14,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, three and fifty-three hundredths (3 53-100) acres, more or less.

Also, the east half of the northeast quarter of section number twenty-two, (22,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States sureighty (80) acres, more or less.

Also, the southwest fractional quarter of the northwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, thirty-nine and forty hundredths (39 40-100) acres, more or less.

Also, the east half of the northwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, sixty-nine and fifteen hundredths acres, (69 15-100) acres, more or less.

611 Also, the undivided one-half of the northeast fractional quarter of section number twenty-three (23,) in township number three (3) south, of range number seventeen (17) west, containing, according to the United States survey, one hundred and forty-five and thirty-nine hundreths (145 39-100) acres, not including the bed and bank of the Paw Paw river, as meandered and surveyed by the United States, more or less.

Also, so much of the southwest fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, according to the United States survey, as lies north of the center of the main public highway or road leading from Paw Paw to St. Joseph, as surveyed by Jehiel Enos, and recorded in the record of highways in the township clerk's office of Watervliet aforesaid, on page five, (5,) containing one hundred and nineteen and twenty-one hundredths (119 21-100) acres, always excepting and reserving therefrom all those certain fourteen (14) pieces or parcels of land, containing in the aggregate eleven and twenty-one and one-half hundredth (11 21½-100) acres, together with their appurtenances, and those certain rights and privileges excepted and reserved in that certain deed and conveyance of above named premises, executed by said party of the second part and his wife, Vallonia S. Swain, to said parties of the first part, bearing date

the twenty-seven day of March, one thousand eight hundred and fifty-five, reference being had to said deed and conveyance, will more fully show and determine.)

Also, the northeast fractional quarter of section number twenty-three, (23,) in township number three (3) south, of range number seventeen (17) west, containing, according the United States survey, one hundred and forty-five and thirty-nine hundredths (145 39-100) acres, more or less.

Also, the right of flowing the following described pieces or parcels of land, in consequence of raising a drain on section number twenty-three (23) aforesaid, eight (8) feet in height, above common low water-mark, namely: the southwest fractional quarter of section number eleven, (11,) and the southwest fraction of the southwest quarter of section number thirteen, (13,) and the south fraction of the southeast quarter of section number fourteen, (14,) and the south half of the
612 northeast fractional quarter of section number fourteen, (14,) and the south fraction of section number fifteen, (15,) and the west half of the northwest quarter of section twenty-four, (24,) all in township number three (3) south, of range number seventeen (17) west, according to the United States survey in Michigan.

Also, all the power and authority of said parties of the first part, or their heirs, "to erect and continue a dam across Paw Paw river, in the county of Berrien, on section twenty-three, township three south, range seventeen west," together with all the privileges, rights, and franchises subject to and under all the provisions, requirements and restrictions by authority and act of the legislature of the State of Michigan," approved March 16th, 1849, being the same premises conveyed or caused to be conveyed to said parties of the first part by said party of the second part and his wife, and these presents are given to secure the payment of part of the consideration money of the said premises."

STATE OF MICHIGAN, *County of Berrien, ss*:

Franklin Muzzy, of said county, being duly sworn, says that John W. Medbery and James F. Aldrich, in the within bill mentioned, are not residents of this State, but that one resides in Illinois and the other in Wisconsin; therefore, he cannot give them notice of an application for an injunction. Also, that on account of the waste in said bill mentioned, loss would happen by delay.

F. MUZZY.

Subscribed and sworn to before me, this 9 day of October, 1857.

BENJAMIN F. FISH, *Notary Public*.

Filed October 9, 1857.

(Signed) WM. S. MERRILL, *Register*.

STATE OF MICHIGAN, *County of Berrien, ss:*

Let a writ of injunction issue on the within bill of complaint according to the prayer therein.

Oct. 9th, 1857.

CHARLES JEWETT,
Circuit Court Commissioner.

613 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify, that I have compared the writings annexed to this certificate, and they are true copies of the respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court of the city of Milwaukee, in the said district of Wisconsin, this ninth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk*,
By JAMES McFARLANE, *Deputy*.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

To Stephen H. Seamens, Catherine M. Stevens, and Edward P. Whaling, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court for the district of Wisconsin, in the seventh circuit, wherein Isaac N. Swain is appellant and you are appellees, to show cause, if any there be, why the decree in this cause, rendered on the 5th day of March, A. D. 1867, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixteenth day of March, A. D. 1867.

A. G. MILLER, *District Judge*.

I hereby admit the service of this citation, this 16th day of March, A. D. 1867.

MATT. H. CARPENTER,
Of Counsel for Respondent.

Mr Justice Clifford

No 20

Supreme Court of the United States.

ISAAC N. SWAIN, Appellant,

ADS.

STEPHEN H. SEAMANS, CATHARINE M. STEPHENS, and ED. P. WHALING, Complainants, Appellees.

J. M. HOWARD.
Of Counsel for Appellant.

J. L. Pearson, Printer, corner 9th and D streets.

Supreme Court of the United States.

ISAAC N. SWAIN, APPELLANT,

ADS.

STEPHEN H. SEAMANS, CATHARINE M. STEPHENS, AND ED. P. WHALING, COMPLAINANTS, APPELLEES.

Abstract of Case.

On the twenty-third of April, 1863, the complainants filed in the Circuit Court for the county of Milwaukie, Wisconsin, their bill against Mr. Swain, (Record, page 2,) asking that a certain mortgage executed to him by John W. Medbery and wife, on certain lots in Milwaukie, on which was situated the "Empire Mill," dated April 14, 1855, might be canceled and discharged for reasons set forth in the bill. On the application of Mr. Swain, who was a citizen of Michigan, the case was removed from the state court into the Circuit Court of the United States for the District of Wisconsin, on the twenty-second of June, (p. 12,) and that court gave the complainants leave to file a new bill, which was done September 7th (p. 13.)

This bill alleges, that on the fourteenth of April, 1855, Swain sold to John W. Medbery and James F. Aldrich real estate lying in Berrien and Van Buren counties, Michigan, for the sum of $52,400, of which $10,000 was paid in cash, and the balance, $42,400, secured by a mortgage on the said lands, payable in installments at differ-

ent times, which mortgage was duly recorded as required by the laws of Michigan.

That Mr. Medbery was then the owner of an undivided third part of Lots 7, 8, 9, and 10, in Block No. 32, in the Second Ward of the city of Milwaukie, and on the same day he and his wife executed to Swain a mortgage on these lots as additional security for the payment of the amount secured by the first mentioned mortgage. The Milwaukie mortgage is set out in the bill (p. 14.) This mortgage is conditioned, by its terms, for the payment of the amount secured by the former, $42,400, "with such interest thereon, at the time, and in the manner specified in the above mentioned bond and mortgage, * * * according to the true intent and meaning thereof."

On the Milwaukie mortgage the appellant, on the same day, indorsed the following stipulation, which has given rise to this suit:

"It is hereby stipulated and agreed by the said party of the second part within named, that if within two years from this date the large saw-mill, fifty by one hundred and fifty feet in size, shall be properly built and completed, upon the foundation commenced last fall by driving piles, which is on the premises described in said mortgage mentioned as being executed by said John W. Medbery and James F. Aldrich and their wives, to accept in place of the within mortgage, security in proper fire insurance policy, or policies, on said large saw-mill, and thereupon to discharge the within mortgage, to which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself, his heirs, executors, administrators, and assigns.

"Dated April 14, 1855.

"(Sig.) ISAAC N. SWAIN, [SEAL.]

"In presence of

"WM. WALLACE STEWART,

"A. LANDON, JR."

The bill alleges that "subsequent to the execution" of this mortgage and agreement, but omitting to give the date, Medbery and wife conveyed away their interest in the lots, and that the appellees "subsequently became

the purchasers," (without stating when,) and that they were, at the commencement of the suit in the state court, the owners in fee of said lots and said "Empire Mill;"

That subsequent to the execution of that agreement by Swain, and within the two years, there was built and completed upon the lands described in the mortgage from Medbery and Aldrich to Swain, and upon the foundation referred to in said written agreement, a large saw-mill of 78 by 100 feet in size, being larger and of greater value and better adapted to the purposes intended than one of the dimensions mentioned in said written agreement; and that said mill, as built and completed, was assented to and accepted by the said defendant (Swain) as a compliance with said written agreement (p. 16);

That on or about the thirtieth of May, 1856, Medbery and Aldrich caused the new saw-mill to be insured in the following companies, and to the following amounts:

In the Ætna Insurance Company, Hartford, policy 371, for one year..... $2,000

In the Washington Insurance Company, of Cleveland, Ohio..... 2,000

In the Jackson Insurance Company, of Jackson, Michigan..... 2,000

And that these policies of insurance were duly assigned, or transferred, and delivered to Swain, and accepted and assented to by him as a compliance with his said agreement, and that he has them in possession;

That on the twelfth of October, 1857, Swain caused the new mill to be further insured for one year in the name of Medbery and Aldrich, for his own use and benefit, in the Ætna Insurance Company for $1,500, and in the Washington Union Company aforesaid for $3,000, and in the Phœnix Insurance Company for $1,500, which policies also covered the grist-mill then on the premises, mortgaged by Medbery and Aldrich to Swain, as follows:

In the Ætna Company..... $1,000

In the Washington Union..... 1,000

That during the life of these policies the grist-mill was destroyed by fire, and that Swain collected the insurance money to the amount of at least $1,000;

That on the twenty-seventh of September, 1858, Swain caused the new saw-mill and other buildings on the premises to be again insured for one year in the name of Medbery and Aldrich, but for his own security, and paid out for premium $210;

That all these insurances mentioned were obtained at the request of Swain, with the consent of Medbery and Aldrich, and upon the understanding that they should reimburse him the premiums;

That on the twenty-seventh of November, 1858, Swain and Medbery and Aldrich accounted together respecting the amount due upon the mortgage, and that Medbery and Aldrich, or their assigns, then paid him $15,236.06, in which sum was included, as paid by Swain during 1857 and 1858 for premiums on the new saw-mill and other property mentioned in the mortgage, the sum of $446.50, and interest at ten per cent.;

That Medbery and Aldrich built another grist-mill in place of the one destroyed by fire, worth more than the latter;

That "during the building and erection of the said large saw-mill upon the premises referred to in the written agreement aforesaid by said Medbery and Aldrich, the said defendant (Swain) was present at different times, and was informed by said John W. Medbery and James F. Aldrich, or one of them, of the intended or the then variation in the dimensions of said saw-mill from 50 by 150 feet, as specified in said written agreement, and that the said mill, as was then being built and was then completed, would be of greater value and better adapted for the uses and purposes intended than it would be if built of said dimensions, as specified in said written agreement, and that the said defendant was then and there asked by said Medbery and Aldrich, or one of them, to consent to

such alteration, and accept the mill as then being built, and since completed, in lieu of the one mentioned in said written agreement, and that said defendant did then and there agree to accept, and did accept the said mill so being built, and afterwards completed, in lieu of the one mentioned in said written agreement, and as a compliance on the part of said John W. Medbery, or of Medbery and Aldrich, with the said written agreement on his or their part;"

That Swain, by reason of defaults in the payment of installments due upon this mortgage of Medbery and Aldrich, caused it to be foreclosed in the circuit court of Berrien county, Michigan, and obtained a decree, under which there was found to be due, on the fifteenth of April, 1863, $22,464.11, and under which the premises were sold and purchased by Swain, G. M. Fisher, and B. A. Olney for $19,600 (fol. 27);

That Swain colluded with Fisher and Olney at the sale to purchase at a small amount, &c., and that Swain has been secured, or paid, through Fisher and Olney, the entire amount due upon the mortgage (fol. 28); and the appellees therefore claim that the Milwaukie mortgage should be canceled and discharged.

The bill is not sworn to, and does not waive defendant's oath to his answer. Exceptions were taken to Mr. Swain's first answer for insufficiency and allowed, (p. 29,) and on the third of May, 1864, he put in an amended answer on oath, (pp. 29 to 43,) to which complainants put in replication June 6th.—(p. 61.)

The answer states that on the twenty-eighth of September, 1854, Swain entered into an agreement with Medbery and Aldrich to sell and convey to them the lands in Michigan, with numerous exceptions and reservations, for $52,400—$10,000 on the delivery of the contract, or within ninety days thereafter, $6,200 and interest on the whole sum unpaid on the twenty-eighth of September, 1855, $6,200 with like interest September 28th, 1856, and

the balance of principal sum of $30,000 in six annual installments thereafter of $5,000 each, and annual interest at seven per cent. on all sums paid when and before due, and at the rate of ten per cent. upon all sums after they shall have become due and payable, until paid; which contract to sell is made part of the answer, and annexed to it as axhibit A.—(See it, p. 48.)

This contract (see fol. 70, p. 49) provides that the house, &c., where Mr. Swain then resided with his family, and also the "shop, building, and fixtures where Russell Swain, a deaf and dumb brother of the appellant, should be excepted and reserved from the sale." This shop and the water-power connected with it were to remain in Russell's use so long as he should choose, and he was not to be disturbed in the occupancy of it;

That Medbery and Aldrich should execute to Swain "good and satisfactory security upon *other property* to the amount of $6,666⅔;"

That Medbery and Aldrich should keep an insurance in some safe insurance company upon the insurable property upon said premises, for at least one-third their value, for the benefit and security of Swain, to be paid over to him in case of losses on the purchase money (fols. 71, 72, p. 50);

That there should be no waste committed on the premises that should impair Swain's securities.—(*Ibid.*)

The answer further avers, that at the time of making this contract Swain had planned and contemplated another saw-mill upon the premises 50 feet wide and 150 feet long, to stand between Russell's shop and a large double saw-mill then in operation; that Medbery and Aldrich approved his plan, and Medbery authorized him to employ one Martin Ruggles to drive the piles for the foundation of the new mill, according to Swain's plan (fols. 45, 46);

That on the fourteenth of April, 1855, Swain delivered his deed of the premises thus agreed to be sold to Med-

bery and Aldrich, and received from them their mortgage on the same lands, dated April 14th, 1855, and also the mortgage on the Milwaukie lots set forth in the bill.

The answer (p. 34) avers, that at this interview Medbery proposed to give the last-named mortgage in performance of the agreement to give additional security, and proposed that it should be discharged if Medbery and Aldrich should, within two years, build a saw-mill on that foundation 50 by 150 feet in size, to be insured for Swain's security as aforesaid, the policies to be accepted instead of the Milwaukie mortgage; that Swain assented to this, "provided the same was built of the size and on the foundation and location as before stated," and that thereupon the mortgage and agreement were executed; that Swain had in view, by insisting upon that particular size and foundation, the protection of Russell's shop as well as the strength and safety of the bulkhead of the new mill.

This was on the fourteenth of April, 1855.

That immediately after the delivery of the papers at this interview (fol. 52, p. 35) Swain left Chicago for New England, and did not return to Michigan until near the latter part of the following winter, when, on visiting the premises, he found Russell's shop cut off from the basement, the basement destroyed and gone, the upper part removed to an inconvenient distance, and away from the water-power which gave it its value, and left a useless wreck. "Then it was he found a new saw-mill erected upon a very small portion of the former site of said shop." It is erected upon other foundations than the one provided and agreed upon, of about 60 feet by 60 feet in size, and then extended over a waste water place of about eighteen feet upon another saw-mill previously built.

Answer (fol. 51, pp. 35, 36,) denies that this new mill was ever properly built or properly completed, or so built with his consent or with his knowledge at the time it was built, and denies that it was ever accepted or intended to

be accepted by him, after seeing the same, as a compliance with said written agreement.

The answer (fol. 55, p. 36,) further denies the truth of the allegation in the bill, that Swain was present from time to time and assented to the deviation in the construction of the mill, and avers that he was not in the State of Michigan during that time, had no knowledge of the deviation, and objected and protested against it the moment he knew of it.

On the final hearing in the circuit court, Swain's counsel read in evidence his deed to Medbery and Aldrich, bearing date the twenty-seventh of March, 1855, being the same he delivered to them on the fourteenth of April. By the terms of this deed (fol. 256, p. 151,) there is excepted and reserved "the use and occupancy of the shop, building, and fixtures connected with the same, where Russell Swain, a deaf-mute, now occupies, together with the use of the water as now used, or in a similar way, so long as Russell Swain chooses or desires, and shall occupy the same free of rent, let, or unnecessary hindrance, otherwise than if in the way of other important improvements, may be removed sufficiently to be reasonably out of the way, and where he can have the same use and privilege as before," &c.

Answer denies that Medbery & Aldrich caused the above-mentioned policies, effected in the Ætna, Washington, and Jackson insurance companies to be assigned to Swain, or in any way transferred to him, or that he accepted them or any of them, or in any way assented to them, or any of them, as a compliance with said written agreement endorsed on the Milwaukie mortgage; but states that on the tenth of October, 1857, owing to Medbery and Aldrich's default in making payments, their strpping off the timber, &c., he did, as he had a right to do under his mortgage, effect an insurance, as mortgagee, in the name of Medbery and Albrich, upon the saw-mills situate upon the premises, as follows:

In the Ætna Company, of Hartford, for.. $1,500
In the Phœnix Company, of Hartford, for 1,500

That while making his application to the Phœnix company at Cincinnati, he accidentally and for the first time learned that Medbery and Aldrich had effected insurance on said mills for $3,000 in the Washington Insurance Company, which fact was before unknown to him; that he never effected any insurance in the Washington company. —(pp. 36, 37.)

Answer admits that about the same time Swain insured the grist-mill for $1,000 in the Ætna for one year in the name of Medbery and Aldrich, but for his security as mortgagee, as he had a right to do by his mortgage, they not having insured it as they were bound to do; that the grist-mill was burnt and he collected the $1,000 and applied it on the mortgage.—(p. 37.)

Admits that on twenty-seventh September, 1858, Swain caused the large saw-mill and other buildings on the premises to be insured, not by Medbery and Aldrich's consent, but on his own motion, as he had a right to do under his mortgage.

Answer admits that Swain. by regular and formal legal proceedings in the circuit court of Berrien county, Michigan, foreclosed the mortgage, and under a decree of sale caused the premises to be sold at public auction on the fifteenth of April, 1863, when he and Fisher and Olney bought them for $19,600, the highest sum offered; which sum did not satisfy the amount due, the balance being $2,864.47, which sum is still wholly due and unpaid, and, as he insists, secured by the Milwaukie mortgage,—referring, for greater certainty, to the record of said foreclosure proceedings.

This record was used in evidence on the hearing and is embraced in the printed case from p. 412 backwards.

The bill of foreclosure was filed October 9, 1857 (p. 412.) On the twenty-fifth of December, 1857, all the mortgagors appeared and put in their answer (p. 395);

the court passed a decree of foreclosure, September 19, 1858, in the usual form (p. 378); and on the sixth of January, 1863, a further order directing a further computation of the amount due (p. 370.) The commissioner reported the amount then due to be $21,749.33 (*ibid.*) On the seventh of January the court ordered a sale of the mortgaged premises, and directed the commissioner to report all his proceedings (p. 366.) He subsequently reported that on the fifteenth of April, 1863, he sold the premises to Swain, the appellant, Fisher and Olney, for $19,600, and gave them his official deed; that the amount on that day due from Medbery and Aldrich, the mortgagors, was, for principal and interest on the bond and mortgage..... $22,347 43
Do. for costs taxed..... 116 68

$22,464 11
From which deduct..... 19,600 00

Amount remaining due from Medbery and Aldrich..... $2,864 11

(See the commissioner's report, p. 359 to 363.)

This report of the sale and of the amount still due and unpaid was confirmed by the court.—(p. 358–9, for the order.)

Points

I.

The first question that arises is, whether Swain in fact consented to the changes in the construction of the new saw-mill, and agreed to accept it, thus constructed, as a compliance with his agreement indorsed on the Milwaukie mortgage, as averred in the bill?

The weight of evidence is against this averment.

It will be borne in mind that one, and perhaps the leading motive with Mr. Swain, was to preserve the shop of his deaf and dumb brother undisturbed; this is plainly referred to in the agreement, when it fixes the size and foundation. This unfortunate brother was an object of

his constant sympathy and care, and it is to be presumed his memory would be keenly awake to any fact or circumstance affecting him.

As evidence of Swain's assent to the change, the appellees rely upon the testimony of John W. Medbery, Aldrich, and Stewart. Medbery swears (p. 127) that "about the time of the completion of the mill, as built by himself and Aldrich, in the month of May or June, 1856, he had a conversation with Mr. Swain in relation to the change of the first plan of said mill; the conversation took place in the mill at Watervliet, Michigan; J. S. Stewart and Mr. Miller (their machinist) were present with himself and Swain; Mr. Miller and myself explained to him the advantages of the change in the plan or dimensions of the mill through, thoroughly, in every part. After we had completed said inspection, I asked Mr. Swain if he was satisfied with the change as made, and willing to consent to it, and he replied that he was. Some other general conversation took place in regard to the additional cost of the mill, the particulars of which I do not remember. The defendant, in that interview, made no objection to the change in the plan and dimensions of the saw-mill."

Stewart (p. 112, in answer to 19th interrogatory) swears to exactly the same purport, and says the interview took place in the fore part of May, 1856. In his answer to the 14th interrogatory, (p. 112,) he plainly leaves it to be inferred that this interview was *after* the new saw-mill was completed.

James F. Aldrich (p. 93) swears he "talked with Swain relative to the change of size; he expressed himself satisfied, and in no way demurred, but said he thought it would cost more money." Witness fixes no date to this conversation. Now, Miller, the machinist, whom both Medbery and Stewart make present at that inspection and conversation in May, and whom the appellees call as a witness, fixes the date of the completion of mill in May,

1856 (answers to 5th interrogatory, p. 140); and he says, expressly, in answer to the 14th and 15th interrogatories (p. 142): "I do not know of such change being made known to the defendant (Swain), and I do not remember to have heard him say anything about it. J. N. Swain, the defendant, was at Watervliet, Michigan, during the building of the mill, two or three times that I saw him. I think he was in the mill once; he never paid any particular attention to it in my presence, or seemed to interest himself much about it. I do not recollect of having any conversation with said defendant in reference to the change made in dimensions of said mill. He never made any objections to me or in my presence to the change in the dimensions of said mill." And, again, in answer to the 8th cross-interrogatory, (p. 143,) he says: "I know nothing about the change, and do not remember of their having contemplated the building of a mill of 50 by 150 feet. I do not remember of having heard Stewart say anything about the change. Stewart brought me a plan for a mill 60 feet square, which I changed to the dimensions of the one built. I do not recollect of having heard Medbery and Aldrich, or Stewart, say anything about a change having been made from a mill of 50 by 150 feet to the dimensions of the one built; nor do I remember what, if anything at all, was said about a mill of the dimensions of 50 by 150 feet."

Swain himself, whose testimony was taken in support of his answer, swears (p. 243, fol. 390) that immediately after the exchange of the papers at Chicago, on the 14th of April, 1855, he left Chicago and went to Jackson, Michigan, and thence to Palmer, Massachusetts, and there purchased property and went into business with Galen M. Fisher, and remained there continuously until January, 1856, when he left for Michigan, and arrived at Watervliet on the 20th of that month, expecting to find Medbery and Aldrich there on that day—though they were not there; that he remained at Watervliet until February

14th, seeking in vain to have an interview with them, and then left for Detroit, where he remained about ten days, and returned to Watervliet about 25th of February. He here waited for them until the 18th of March, and not hearing from them, went to Chicago about the 21st of March, and on the next day saw Aldrich at Chicago. Aldrich agreed that he and Medbery would meet him at Watervliet on the 25th of March. Swain went there as agreed, but Medbery and Aldrich did not come. Swain returned to Chicago on the 27th of March, and, finally, again found Aldrich, who apologized. Swain watched the movements of Medbery and Aldrich, and, finally, learning that they were to be in Watervliet on the 2d of April, went and found both there. While there, Swain came to a settlement with them of some accounts for logs, &c., and obtained their draft for $1,735.54 on the 7th of April; and then took Medbery aside, and, sitting on a mill log, not in the mill, pointed towards the wreck of Russell's shop, and said to him—"Medbery, look at that wreck; all that is left of that nice, comfortable shop, that you know I very particularly reserved in the sale of this property to you, for the special benefit and livelihood of my poor unfortunate brother, who cannot speak a word for himself," &c., &c. (fol. 295, &c.); and that Medbery and Aldrich left Watervliet on the 8th of April, since which time Swain has never seen either of them. (p. 248, fols. 398, 399, &c.)

The account given of this interview of the 7th of April, by Mr. Swain, negatives, in the strongest and most decisive manner, the idea that he ever consented to the change in the size and situation of the mill, or to the removal of Russell's shop. He was justly offended at the rudeness with which his brother had been treated by Medbery and Aldrich; and it would be strange and unnatural indeed, if, under the sting of such feelings, he had, on the spot, ratified and approved the very acts which had wounded his sensibility.

Mr. Swain remained at Watervliet until the 13th of

April, and then left for Palmer, Mass., (fol. 398). He states positively that he arrived at Palmer on the 17th, and from that day to the 23d of September, 1856, he was not absent from Palmer any two full days together, and was not within that time within the limits of Michigan (fol. 399, p. 248); so that he could not have been at Watervliet after the mill was completed, and in May, 1856, as Medbery, Aldrich, and Stewart swear.

His statement of his absence is corroborated by the testimony of Philo Parsons, who swears he saw him and transacted business with him at Detroit on the 15th of April, (p. 294, fol. 472,) and went with him to the ferry-boat when he started for Massachusetts, and that had he been in Michigan before the following September, such were his business relations with Swain, that he, witness, would have known it; also, by Galen Fisher, who swears (p. 210, fol. 337) that he was in Palmer during all that time, and saw Swain almost every day, and that he was not out of Palmer for any two days during that whole period. Also, by Clinton B. Fisk, whose deposition (p. 216, &c.) shows that he saw Swain and his wife at Palmer on the 19th of April, and that he did not leave there till into September.

By Aaron Swain, also a resident of Watervliet and brother of the appellant, who swears (p. 162, fol. 271) that the appellant left Watervliet about the 1st of April, 1855, to go to the Eastern States, and was gone and remained away from Watervliet nine or ten months; and that the new mill was put up and enclosed while he was away from Watervliet.

So that if Mr. Swain is correct in his testimony, he has never seen Medbery or Aldrich since the 8th of April, 1856, at Watervliet, and the pretended interview in the mill, after it was completed, and in May, 1856, testified to by Medbery and Stewart, is all a mistake or a contrivance, disproved even by the witness Miller, who Medbery and Stewart claim was present.

Swain's testimony shows that after he left for the east, in April, 1865, he never had any interview with Medbery of any kind at Watervliet, except between the second and eighth of April, 1856; and this is shown by the proofs to have been a month or so before the mill was completed. It is *after* this completion, in May, and while Swain was in Palmer, Massachusetts, that Medbery and Stewart make the interview take place in which Swain agreed to accept the new mill, &c.

But Stewart's testimony contains in itself the elements to show that he has falsified the facts. He swears, in answer to the third direct interrogatory, (p. 109,) that he went to Watervliet to reside, from Homer, New York, on the fifth of June, 1855, and resided there till December, 1857. Now when he went there Swain is proved to have been absent in Massachusetts, and to have remained absent till January 20, 1856; and this witness, in answer to the second interrogatory, whether he knows the parties to the suit or either of them, and how long he has known them or either, and which of them, answers (p. 109) that he "does know Isaac N. Swain, and has known him from about the month of May, in the year 1856." Plainly, he had never seen Swain until the latter visited Watervliet in the winter and spring of 1856; and if he had any interview with him at all when Medbery and Aldrich were present, it must have been the one which took place between the second and eighth of April, before and not after the mill was completed, and in which both Swain and Miller swear there was no acceptance of the new mill by the former.

There never was in fact but this interview between Swain and Medbery and Aldrich, since the sale in April, 1855; and this took place at a time when Medbery and Aldrich had repeatedly failed in their engagements, had grossly offended Swain, and endeavored to shun and avoid him, and when he had become utterly distrustful of their honesty and responsibility. This is clearly proved by his

careful and very circumstantial statement as a witness. How improbable, with such feelings and under such circumstances, that he should have yielded up one of the main points in the controversy, and agreed to accept the new mill, (not yet finished,) and policies of insurance upon it, (not yet issued,) in place of the Milwaukie mortgage, which, by the way, was given to secure the *whole of the large mortgage debt in Michigan, and not merely six or eight thousand dollars, the amount that could be insured on the new mill!*

And Medbery's subsequent conduct is inconsistent with the idea that Swain had accepted the new mill as a compliance.

If the former believed this, why did he not act upon that belief, and at once demand a discharge of the Milwaukie mortgage in 1856, when, as is pretended, the mill was accepted and the policies of insurance procured upon it and delivered to Swain? Why did he and his assignees lie by until after the final sale under Swain's decree in April, 1863, seven years after the pretended right to a discharge had accrued, before demanding it? Even Medbery in his testimony nowhere pretends that he made such a demand; nor does he explain this silence. The counsel for the appellees did not choose to ask him the question. This long silence is sufficient to convince any business man that the pretention is unfounded in fact and a mere afterthought. It cannot be supposed that there was any necessity to wait till the final disposition of Swain's foreclosure suit, for the right to a discharge of the Milwaukie mortgage was to accrue within two years from April 14, 1855, and was perfect the moment the policies should be accepted by him. A construction of the written agreement that would postpone Medbery and Aldrich's right to a discharge of the Milwaukie mortgage, *until the foreclosure of the large mortgage*, would defeat the manifest intention of Swain in giving that agreement.

He agrees to accept security in proper fire insurance

policies, and "*thereupon* to discharge" the Milwaukie mortgage; this delay, it is submitted, is a pregnant circumstance against the truth of the statement of Medbery, Aldrich, and Stewart, respecting Swain's waiver and acceptance. There was a flouring-mill on the Milwaukie lots. It was important to keep the title clear and unclouded. Why was so thick a cloud suffered to rest upon it for seven long years without any attempt to dissipate it? And for aught that appears in the case, Medbery held his title to his one-undivided third part down to the time of filing this bill in the state court, (April, 1863,) and the presumption is that he did.

This conduct of Medbery, is, of itself, a sufficient contradiction of the statement he now makes. The delay is inconsistent with the state of facts he and Stewart and Aldrich now seek to set up.

Again, when and where and how was this assent given? The two main Allegations of the Bill

The bill contains two allegations on the subject—one in folio 23, "that subsequent to the execution of the agreement, and within the time mentioned in the agreement, there was built and completed upon the lands described in the mortgage from Medbery and Aldrich to Swain, and upon the foundation referred to in said agreement, a large saw-mill of 78 by 100 feet in size, being larger, of greater value, and better adapted for the purposes intended than one of the dimensions mentioned in said written agreement; and that the said mill, as built and completed, was assented to and accepted by said defendant as a compliance with said written agreement."

~~Though not explicitly, yet by plain implication,~~ The pleader here avers that this acceptance was *after the mill was completed.*

But in folio twenty-six he is perfectly explicit in his averment that this acceptance was given by Swain "*during the building and erection of the large saw-mill.*" It is in substance that Swain was present at different times during the building and erection of the mill, and was informed

by Medbery and Aldrich, or one of them, of the "*intended*, or the then variation in the dimensions of the mill from fifty by one hundred feet, as specified in the agreement, and that the said mill *as was then being built* and as was completed, would be of greater value," &c.; and that Swain was *then and there* asked by Medbery and Aldrich to consent to such alteration and accept of the mill as *then being built* and since—(of course since that time)—completed, in lieu of the one mentioned in the agreement, and that Swain did *then and there* agree to accept and did accept said mill so being built and afterwards completed, &c.

Medbery swears the conversation in which Swain consented took place "*about the time of the completion of the mill, in May or June*, 1856."

Stewart fixes it *the fore part of May*, 1856, and, in his answer to the fourteenth interrogatory, states that it was *after the mill was completed.* When was it completed? Miller answers this question. He says, in answer to the fifth interrogatory, it was completed and in running order in *May*, 1856 (p. 140), and in Medbery's letter to Swain of May 19, 1856, he says, "we expect to have our mill finished and ready to run in the course of two or three weeks" (p. 356). Now it has been conclusively shown that after the eighth of April, Swain did not see either Medbery or Aldrich, and was not in Michigan till the following September. So that the interview alluded to by Medbery, Aldrich, Stewart, and Miller, must have been the *same* as that mentioned by Swain, and which took place between the second and eighth of April, a month and more before the mill was completed.

Thus the evidence applies solely to the second of the above two averments, and not at all to the first.

Aldrich does not swear that he was present on that occasion, though Medbery says he was. Is it not a little suspicious that Medbery should not be here sustained by Aldrich? Stewart swears he himself was present, but neither Miller nor Aldrich mentions that fact; and strange

to say, *Miller*, who superintended the building of the mill, denies that he had any such conversation as Medbery swears took place in his hearing!

The mill was not then completed. Swain's written agreement required that it should be "properly built and completed upon the foundation commenced last fall." How improbable that he should agree to accept it in advance of its completion, at a moment when it was impossible for him to judge satisfactorily of the quality and value of the new mill.

Now, Stewart is not to be believed, and his testimony as to Swain's acceptance must be wholly rejected as false and fabricated. He is asked, in the 14th interrogatory (p. 105), "*Was such change known or made known to said defendant? If yes, when, where, and by whom, and what was said by said defendant?*"

In his answer to this question (p. 112) he says distinctly, "but whether such change was known, or made known to said defendant, Isaac N. Swain, before the erection of said saw-mill was completed, *he cannot say.*" He does not profess to know the main fact avered in the bill, viz: that it was *during* the erection of the mill that Swain waived his contract, and agreed to accept a different mill. And in the next breath (fol. 182, same page,) he states positively that it was in the forepart of the month of May, 1856, that he and Miller and Swain went in and examined the mill, and that Swain accepted it as "satisfactory." Swain denies all this, and pronounces it wholly, entirely, and altogether untrue.—(p. 256.)

No such thing took place in May, for Swain was then in Massachusetts; and as Stewart denies that Swain, during the building of the mill, had any knowledge of the change, it follows that he could not have been present at the interview that took place between the second and eighth of April; and this accords with Miller's silence as to Stewart's being present. Stewart's story, so minute and circumstantial, of Swain's acceptance after the com-

pletion of the mill, is manifestly a complete fabrication, entitled to no credit whatever.

It will be observed that Aldrich fixes no time or place for his conversation with Swain.—(See p. 93.) And so this question of fact must turn either upon the testimony of Swain, corroborated by the circumstances of the case, or that of Medbery, unsupported by any credible witness, or by any circumstance in the case.

The court will not overlook a suspicious coincidence of expression in the narratives of Stewart and Medbery. Stewart is careful to say that "after the inspection and examination had been gone through with, and the explanations given, and the reasons assigned for the changes thus made in the erection of the mill, the said Swain was asked by the said Medbery if he was satisfied with the change that had been made, and was willing to consent thereto, and that said Swain replied that he was."—(p. 113.)

Medbery swears, (pp. 127–8,) "We all examined the mill through, thoroughly. After we had completed said inspection, I asked the defendant, Mr. Swain, if he was satisfied with the change as made, and was willing to consent to it, and he replied he was."

This possibly may be explained by the fact that Stewart was examined at Homer, New York, in July, 1864, (pp. 108, 109,) and Medbery at Little Rock, Arkansas, November 5th, 1864, and that Medbery had had the benefit of Stewart's deposition before him, or of a copy of it.

And both these witnesses concur in making Miller, the machinist who built the new mill, explain *to Swain* the *advantages* of the *new plan above the old one—which Miller totally denies.* Miller could not be suborned. Stewart and Medbery have an interest in getting rid of the Milwaukie mortgage and punishing Swain for his pertinacity.

Swain swears (p. 244) he went from Massachusetts to Watervliet in January, '56, in consequence of Medbery

and Aldrich's having dishonored his draft upon them for the installment due the previous September, and of having heard that his brother's shop had been removed. And he swears that while at Watervliet, on the ninth of February, he *wrote them a letter* strongly protesting against their neglect of his log account, their non-payment of the taxes, the *mill they were then building, and the destruction of the shop*, (p. 245,) and asking them to come there and settle with him. And he swears (p. 247, fol. 397) that in the very interview in which Medbery swears he consented, he "then and there protested against the change in the shape, size, and plan of the mill as a violation of the agreement in the first place, and their assurances afterwards." And this was natural and consistent with his feelings and situation. By his agreement of sale with Medbery and Aldrich, (p. 302,) the use and occupation of Russell's shop were expressly reserved. The same reservation is found in his deed to them, made in pursuance of the agreement (p. 151); and the same reservation is embraced in the mortgage from Medbery and Aldrich to Swain (p. 308). The whole scene was now before him. He saw that a gross trespass had been committed upon him in the breaking up of the shop and the destruction of its water-power. Medbery admitted it was "shameful, the way it had been left." Swain had caught them there by stratagem, and by "watching their movements" in Chicago, after repeated evasions on their part to meet him there. And finally, Medbery, in the same conversation, claimed the *right* to tear away the shop in the face of the contracts he had made. Medbery then made an excuse to see Aldrich, went off, and did not return.—(p. 248.) Both were manifestly angry.

Who can suppose that in such an interview Swain consented to the altered plan of the mill, and agreed to accept policies upon it "in place" of the Milwaukee mortgage, which covered the whole debt? The thing is incredible.

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Who can suppose that in such an interview Swain consented to the altered plan of the mill, and agreed to accept policies upon it "in place" of the Milwaukee mortgage, which covered the whole debt? The thing is incredible.

It is submitted, that the evidence of this pretended parol agreement for a change in the size and dimensions of the new saw-mill leaves the fact so uncertain that a court of equity will not attempt to enforce it. If there be a doubt whether a negotiation resulted in a concluded agreement, no decree for a specific performance will be granted.

Carr vs. Duvol, 14 Pet.
11 Ves., 583.

II.

We insist that such a consent and such a verbal agreement are void by the statute of frauds of Wisconsin. It is true, that by the statutes and decisions of that state the fee of mortgaged premises vests in the mortgagee only after foreclosure and sale, not upon the mere default of the mortgagor, (Wood et al. vs. Trask, 7 Wis., 257; 2 Black's Sup. Ct., R., 575,) and that the mortgagee cannot till then maintain ejectment. Yet, it does not follow that an agreement to discharge a mortgage does not fall within the statute.

The Wisconsin Code of 1858, (p. 613,) declares that "no estate, or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, *surrendered*, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or his lawful agent thereunto authorized by writing."

"SEC. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made."

The same code, same title, (p. 615, sec. 6,) declares that

"the term lands," as used in this title, shall be construed as co-extensive in meaning with "lands, tenements, and hereditament;" and the terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined."

In Stevens vs. Cooper, 1 Johns. Ch. R., 425, an attempt was made to set up a parol agreement by the mortgagee that he would release his mortgage on sundry of the mortgaged lands on their being sold by the mortgagee, on being paid a certain amount, supposed to be *pro rata* upon all the tracts. But Chancellor Kent held the evidence inadmissible. He says "such testimony is not only contrary to the statute of frauds, but to the maxims of the common law."

A mere promise to make a mortgage is inadmissible for the same reason.—(7 Gill. R., 362.)

In Boyd vs. Stone, 11 Mass. R., the grantee in an absolute deed made a parol agreement, upon sufficient consideration, to execute a defeasance, but the court held the promise void by the statute of frauds.

Nor can a parol agreement be enforced to substitute other lands for those mentioned in the mortgage.

Castro vs. Illies, 13 Tex., 229.

In Hunt vs. Maynard, 6 Pick., 489, the mortgagee had agreed verbally with the assignee of the mortgagor that the assignee should hold the land discharged of the mortgage, there being no sufficient consideration for the promise. The court say, "We are called upon to enjoin against the use of a mortgage deed by verbal proof that the respondent had given up his estate. The proposition is self-evidently false."

In Parker vs. Barker, 2 Metc., 431, the statute of frauds was applied to a similar promise, where the promisee had fully acted upon and complied with its conditions.

III.

But in case Swain did agree to accept the the new mill as changed, Medbery could not entitle himself to a discharge of his mortgage without procuring and delivering to him the policies of insurance called for by his agreement. This was not done.

The agreement is to "accept, *in place* of the Milwaukie mortgage, security in proper fire-insurance policy or policies on said large saw-mill, and thereupon to discharge the within mortgage."

A question arises as to the true intent and meaning of this agreement. Does Swain intend that the policy or policies to be effected on the new mill shall cover the whole period of time during which there shall remain anything due upon the main mortgage, and that he is not to release until he has such policies in hand; or does he mean that Medbery shall be entitled to a release whenever the latter shall give him a policy running, for only a year, the *usual* time?

The agreement itself leaves this question in some obscurity; but, by referring to the original contract of sale and the Milwaukie mortgage, it is perfectly evident he meant to preserve and keep up his *additional security* so long as any portion of the original debt remains due.

That contract, (p. 302,) after stipulating that Swain shall deed the Michigan lands, adds—"upon and at the same time the said parties of the second part shall execute to the said party of the first part *good and satisfactory security upon other property* for the amount of $6,666\frac{2}{3}$, and also their bond and a good and sufficient mortgage upon the lands above described, conditioned to pay the said party of the first part said $40,000 as above mentioned, in eight equal annual installments," &c.

And further, the mortgage itself, from Medbery and Aldrich to Swain, contains the express stipulation (309) "that the parties of the first part shall and will truly keep the

buildings erected, and the *large saw-mill to be erected* upon the premises above described, insured in some safely reputed fire-insurance company or companies against loss by fire, and assign the policy or policies and certificate or certificates thereof to said party of the second part, his executors, administrators, or assigns. And all moneys received by said party of the second part, his heirs, &c., on account of such insurance, in case of loss or losses, shall be indorsed on this indenture to apply on any moneys then due or next to become due thereon; and in default thereof it shall be lawful for said party of the second part, his heirs, &c., to effect said insurance, and the premium or premiums paid for effecting the same, and the costs and charges shall be a lien on said mortgaged premises, added to the amount of said bond or obligation, and secured by these presents, which shall be payable for each preceding current year on the 28th day of September, in each and every year, *until all obligations herein be fully paid.*"

Nothing can be more evident than that by the contract of sale the *additional security* was to be of the same duration as the main mortgage; hence the Milwaukie mortgage was conditioned (p. 15) to "pay to said party of the second part, his heirs, &c., the aforesaid sum of money, ($12,400,) with such interest thereon at the time, and in the manner specified in the above-mentioned bond and mortgage, executed by said parties of the first part and said James F. Aldrich and his wife as aforesaid, according to the true intent and meaning thereof."

This mortgage was then as enduring a security for the payment of the principal debt as the main mortgage; and it is impossible to suppose that Mr. Swain in granting, by his agreement, the privilege of substituting policies of insurance for the Milwaukie mortgage, intended that a policy running but for *one year* should operate as a complete extinguishment of his right to have additional security. Such a construction of his agreement would have

the effect, in case there should be no loss within the year, to deprive him forever of the *additional security* for which his contract of sale and his main mortgage had so carefully provided. It would be a narrow and harsh construction, inconsistent with the intention of the parties, as evidenced by the contract of sale, the main mortgage, and the Milwaukie mortgage. It was all one transaction, and must be so treated in giving effect to Swain's agreement, indorsed upon the Milwaukie mortgage. When, therefore, Swain, in this agreement, promises to accept, "in place of the within mortgage, security in *proper fire-insurance policy* or *policies* on said large mill, and thereupon to discharge the within mortgage," he means policies that shall operate as security as long as the Milwaukie mortgage would have so operated if let alone.

And yet, it was the intention of both Medbery and Swain to have the Milwaukie lots relieved of that mortgage before the final payment of the main mortgage; otherwise Swain's agreement to accept policies would be of little value to the former.

The only true and reasonable interpretation of the agreement is, that on the completion of the new mill, as required, it was Medbery's duty immediately to procure a proper insurance policy upon it in the name or for the use of Swain, and to deliver it to him as a compliance with the agreement, specially notifying him that it was given *under this agreement*, and not under the mortgage, and for the sole purpose of relieving the Milwaukie mortgage. On such a delivery or tender of a policy, it would seem to be the duty of Swain to discharge the Milwaukie mortgage, though the policy should have expired in a year—the duty still remaining upon Medbery to see that the insurance was continued in good faith so long as their remained anything due upon the main mortgage. This last duty, it cannot, I think, be questioned, attached to Medbery from the moment he assented to Swain's agreement, and has rested upon him ever since.

The Milwaukie mortgage was a *permanent* security. It was to hold good, by its very terms, while any part of the main debt remained unpaid. This is too plain for cavil. And the policies of insurance were to take its "*place;*" they were to be substituted for it. Who can suppose that Swain intended to discharge this permanent security for a debt which was not, by the terms of the bond, to be paid until the end of eight years, by accepting policies of insurance that were to operate as security only for one year from the completion of the new saw-mill, and that, at the end of that time, he was to be content with no additional security at all? No one can suppose this, and such a construction is inconsistent with the very language of the contract of sale, which requires Medbery and Aldrich to give additional security, as well as the agreement, which requires Swain to accept the insurance "*in place* of the within mortgage," which was to hold the Milwaukie property until the debt should be paid.

If, then, the true construction of the agreement makes this additional security as enduring as the indebtedness itself, it is clear, first, that the foreclosure suit on the main mortgage could have no effect on the Milwaukie mortgage, unless the sale under the former satisfied the debt, which is not pretended; and, second, that it was the duty of Medbery, at all times, both before and since that foreclosure, to keep the saw-mill insured. It is his duty now, notwitstanding the sale, and will bind Medbery, and all persons having notice of Swain's agreement, and all privies in estate with Medbery. The agreement contemplated a security on the new mill until the debt should be satisfied. The bill claims (p. 17) that for 1857 and 1858 Swain insured it himself; that "this insurance was so obtained at the request of the defendant, and with the assent of Medbery and Aldrich, or their assigns, and upon the understanding and agreement that Medbery and Aldrich, or their assigns, should reimburse and pay defendant the amount of such insurance premium so

paid by said defendant, *i. e.*, for those two years, 1857 and 1858. But the bill contains no averment that this pretended agreement of Swain to insure, covered any period of time after 1858. The complainants dared not allege that it covered any future time. And yet, if it was made merely for those two years, it was plainly Medbery's duty to effect insurance for the succeeding years. For this neglect he sets up no excuse whatever—at least, none is proved by himself, Aldrich, Stewart, or any other witness. And yet the court is now asked to discharge the Milwaukie mortgage while $2,800 of the original indebtedness remains confessedly unpaid!

The question now is, has Medbery performed this duty? If he has not, he has not done equity, either by himself or his assigns.

It is alleged in the bill that he procured policies. If he did, the fact that he delayed for seven years to demand a discharge of this mortgage is a very strong circumstance to show they were not procured with a view to obtain a discharge, but under the general duty of Medbery and Aldrich expressed in the main mortgage (p. 309) to keep all the buildings, the new saw-mill with the rest, insured.

The averment in the bill (p. 16, fol. 24) that Medbery and Aldrich insured the saw-mill for one year in the Ætna, Washington, and Jackson companies, to the amount of $6,000, and that they assigned the policies to Swain, is denied in Swain's answer (p. 36, fols. 52 and 53). Stewart swears (p. 112) that on or about the thirtieth of May, 1856, he procured of Plympton, the agent at Niles, Michigan, three policies on the *saw-mill* for $2,000 each; that he procured them for Medbery and Aldrich, and as their agent, and that they were sent by him to Aldrich, at Chicago; "that *according to his best recollection* they were mailed by him (Stewart) at Niles, to the address of said Aldrich, at Chicago, on the same day they were procured by him; and whether the said policies were assigned or not he does not know."

Aldrich in his testimony on this subject treads lightly. He says, (p. 93, answer to 12th interrogatory,) "In the spring of 1856 I received (I think from my partner J. S. Stewart) policies of insurance, I think three, on said mill, amounting to six ~~hundred~~ (probably should read thousand) dollars, procured for the defendant, and which I afterwards handed to the defendant, I think at Chicago. Said policies were received very soon after the mill was completed. I do not now remember the name of the companies that issued the policies. They were procured at Niles, Michigan; I think by J. S. Stewart."

Answer to thirteenth interrogatory: "I do not now recollect whether said policies were made direct or assigned to the defendant. They were accepted by the defendant without objection. I think, however, that at that time he remarked that he knew little or nothing about one of the companies." In answer to the first thirty-eighth cross-interrogatory, he repeats: "the policies of insurance *I think* were obtained by J. S. Stewart, at Niles, Michigan, and by him sent to me at Chicago, and by me delivered to the defendant at Chicago."—(p. 99.

Swain positively denies this in his answer to the twenty-first and twenty-second interrogatories, (p. 250,) and says "he positively knows, and therefore states, that Aldrich never delivered to him any other policy or policies than" the one just mentioned, and that policy was in the Jackson Mutual for $6,000, No. 10,657, *on other property*, and was delivered to him by Aldrich, not in 1856, but on the fourteenth of April, 1855, at Chicago—the day the deed and mortgages were passed.

Stewart and Aldrich both give us to understand that these three pretended policies were delivered to Swain at Chicago, in 1856, and soon after the completion of the mill; yet the proof is overwhelming that Swain was then out of the State and in Massachusetts.

Again, there is absolutely no proof that, if there ever were any such policies, they were issued to Swain or as-

signed to him, nor that he was notified that they were given to dim in fulfillment of his agreement, and with a view to his discharging the Milwaukie mortgage. Who can say, upon such loose and suspicious testimony as this, even if uncontradicted, that Medbery entitled himself to a discharge of his mortgage?

Mr. Swain is accurate, and gives a full list and copies of all the policies ever given to him by Medbery and Alerich, or either of them.—(p. 251.) They are as follows, each being for one year, and sent to him by mail to Massachusetts, in July, 1856:

No. 10,657, (above referred to,) in the Jackson Mutual, for $6,000; to Medbery and Aldrich, on their grist-mill, $2,000; on their saw-mill, $2,000; on their store, $2,000, dated April 16, (probably 10th,) 1855, and assigned to Swain, April 16. This was before the new saw-mill was built.—(See Exhibit E., p. 313.)

Western Insurance for $300, to Medbery and Aldrich, on wooden building one-and-a-half stories high, used as a boarding-house; signed by *Plimpton*, at Niles, April 13, 1856, assigned to Swain under same date.—(Exhibit F, p. 322.)

No. 30,004, Washington Union, $500, to J. S. Stewart, on his dwelling-house in Watervliet; signed at Niles, by *Plimpton*, May 22, 1856; and assigned by Medbery and Aldrich and Stewart to Swain, July 10, 1856.—(Exhibit G, p. 238.)

No. 30,008, Washington Union, for $1,250, to Medbery and Aldrich; $800 on their frame tavern-house, $200 on their frame building occupied as a boarding-house, $250 on their frame dwelling-houses, signed at Niles, by *Plimpton*, May 22, 1856, and assigned by Medbery and Aldrich to Swain, July 10, 1856.—(See Exhibt H, p. 334.)

No. 30,009, Washington Union, for $500, to Medbery and Aldrich, on their frame building occupied as a *grist-mill*, signed by Hoffman, as agent, at Niles, May 30, 1856, and assigned to Swain, July 10.—(Exhibit I, p. 241.)

No. 369, Ætna, to Medbery and Aldrich, for $800, on their frame building occupied as a tavern, signed by Hoffman, agent, at Niles, May 30, 1856, and assigned to Swain, July 10.—(Exhibit J, p. 341.)

No. 370, Ætna, to Medbery and Aldrich, for $500, on their frame *grist-mill*, signed by Hoffman, agent, at Niles, May 30, and assigned to Swain, July 10.—(Exhibit K, p. 348.)

In this list are three policies signed by *Plimpton*, to whom Stewart swears he applied for insurance in May, 1856, soon after the completion of the saw-mill, but neither these nor any other policy in the list, is an insurance on the new saw-mill, but on other property.

Stewart thinks he was at Niles and procured a policy on the new mill, from *Plimpton*, on the thirtieth of May. Three in the list were issued to Medbery and Aldrich on that day, but by Hoffman and not Plimpton.

Had any *other* policies been procured by Stewart it is probable they too would have been assigned and sent to Swain. But he never received any others.

These facts not only prove that Medbery and Aldrich did not insure upon the new saw-mill in 1856, but that their testimony on this vital point is utterly unreliable.

Paine, another witness for the appellees, swears (p. 76) that he has in his posssession the books of the Ætna agencyat Niles for 1856, in the handwriting of Hoffman, the agent of that company, from which it appears that a policy (No. 371) was made to Medbery & Aldrich for $2,000, on their frame saw-will, (water-power,) on the thirtieth of May, 1856, for one year; he also says that the two above policies, Nos. 369 and 370, are noted on the same books, as was also a memorandum that the Ætna had notice of $2,000 insurance on the saw-mill mentioned in No. 371, in the Washington Union, and of $2,000 in the Jackson Mutual.

This evidence of the contents of Hoffman's books was objected to as incompetent, (p. 74, fol. 105,) and was

plainly incompetent. Of itself it proves nothing as against Swain, and does not even purport that the policy, (No. 371) was ever delivered to Medbery & Aldrich, much less to Swain. The same witness swears (p. 75.) that Hoffman then resided at Detroit. And yet the appellees do not call him as a witness at all.

Swain swears in his deposition (p. 250, in ans. to 22d interrogatory) that "he never received from Medbery & Aldrich or either of them, any policy or policies of insurance upon said new saw-mill to the amount of $6,000, or any other amount that he has any knowledge or remembrance of whatever;" and again, (in ans. to the 26th, p. 251,) that after the reception of said policies of insurance mentioned (in the above list) "he never again at any time or place received any policy or policies of insurance from Medbery & Aldrich or either of them."

Stewart (p. 112.) swears he procured from Plimpton three policies on the mill May 30th, 1856.

One in the Ætna for	$2,000
" " Washington Union for	2,000
" " Jackson Mutual for	2,000

and sent them to Aldrich in Chicago.

It is alleged in the bill (p. 16,) that the Ætna policy was of that date and was numbered 371. This policy then (No. 371) was, according to Aldrich (p. 93, answers to the 12th and 13th interrogatories,) handed to Swain at Chicago after the mill was completed. This statement is plainly a mistake, for Swain was then in Massachusetts.

So that if No. 371 was ever actually issued and sent, as Stewart swears, to Aldrich at Chicago, the latter retained it in his own hands and Swain never had any knowledge of it. Aldrich, in his supplemental deposition (p. 102) thinks, according to his recollection, he handed the three policies to Swain the latter part of September 1856, when Swain was in Chicago; but Swain (p. 250) swears that he positively knows this is not so.

But it is sufficient that there is no competent evidence that No. 371 was ever taken out or delivered. If it were in existence, and Stewart and Aldrich have told the truth, it is now in the hands of Aldrich, who does not produce or account for it.

There is then no sufficient evidence in the case that Medbery and Aldrich effected any insurance whatever upon the saw-mill in 1856; and Swain of course was not put in a position to be obliged to discharge the Milwaukie mortgage.

Did Medberry and Aldrich, after that year, insure the saw-mill so as to put him under that obligation?

Aldrich swears (p. 93, answer to 14th interrogatory,) "I think Medbery and Aldrich procured one or more policies on said saw-mill in 1857 or 1858, but did not procure more for the reason that defendant asked the privilege of obtaining other insurance for himself, which request was granted."

Thus he seeks again to alter the contract, and without any consideration, to cast upon Swain the burden of procuring the insurance.

Swain denies he ever asked the privilege (p. 252, fol. 405.) He swears (p. 252, fol 404) that after the 30th of May, 1856, he had no insurance on the property there except *Exhibit E*, being a policy in the Jackson Mutual, dated April 16, 1855, which of course did not cover the new saw-mill, not then built, but an old one and other property.

He swears (*ibid*) that in an interview he had with Aldrich at Chicago, about the first of October, 1857, Aldrich "*refused* to obtain further insurance, stating that they could not afford it."

And there is no averment in the bill that, after 1856, Medbery and Aldrich ever effected any insurance on the new mill. The bill avers (pp. 16, 17, fols. 24, 25,) that in October, 1857, Swain himself, by the consent of Medbery and Aldrich, or their assigns, and upon the under-

standing and agreement that Medbery and Aldrich, or their assigns, should reimburse and pay said defendant the amount of such insurance premium paid by said defendant, insured the new saw-mill for $1500, for one year, in the Ætna, (policy No. 441, which should be 411,) in the Washington Union for $3,000, and in the Phœnix for $1500; and that in September, 1858, by the same consent, and under the same agreement, Swain caused the same saw-mill to be again insured for a year in the *Market*, *Irving*, *Resolute*, and other companies of the city of New York, in the name of Medbery and Aldrich.

In his answer, (p. 37,) Swain admits that on 10th of October, 1857, he caused the saw-mills (there were two, an old one and the new one,) situated on the premises to be insured in the Ætna for $1500, for one year, in name of Medbery and Aldrich, but for his benefit and security; and in the Phœnix for the further sum of $1500; but denies that he insured in the Washington Union, stating that when making these applications he for the first time learnt that Medbery and Aldrich had insured on said mills for $3,000 in the Washington Union; but that he never insured in the latter company at all. He admits that he insured the saw-mill and other buldings on the premises, in the above-named New York companies, (p. 38, fol. 54,) but asserts that the insurance which he, this defendant, effected as aforesaid was not effected as alleged with the consent of said Medbery & Aldrich, or their assigns, but only on the motion of this defendant and without their knowledge or consent, this defendant acting in the premises solely under the said mortgage of said Medbery & Aldrich" (p. 36.)

This statement is supported by his testimony in his answer to the 28th interrogatory, (p. 252,) which should be carefully read. He says he obtained some policies from the agent, Paine, at Niles, October 10th, 1857. Paine tells us what they were, viz:—

Ætna, No. 411, for $1500, on the saw-mill, and $4,000

on other property on the premises for one year, all in one policy (pp. 76, 79); Phœnix, for $1500, same date; on the saw-mill mentioned in policy No. 411, for one year. Both these issued in the name of Medbery and Aldrich, for benefit of Swain. Near the expiration of these policies, and in September, 1858, Paine declined to insure further on the mortgaged property by letter to Swain (p. 355.) Swain was then in New York, (p. 524,) where he effected insurance on $6,000, on said saw-mill, though he furnishes no statement of the policies.

After procuring these policies in New York, in 1858, no other insurance was effected upon the mill or other mortgaged property, either by Swain, by Medbery and Aldrich, or by their assignees, till after the final sale under the decree of foreclosure in 1863, to Swain and his associates. The premiums paid by Swain were refunded to him by Carr & Aldrich (pp. 253–4) amounting to $446.50. (See Wm. Aldrich's testimony, pp. 132, 131.)

The appellees now claim that because Swain thus insured the mill and was reimbursed the premium money, his act should be treated as a release of Medbery & Aldrich from their duty to keep it insured, and as a performance for them of that duty; in other words, they set up another waiver of his contract by Swain.

It is not even pretended that there was any consideration for this waiver. Medbery and Aldrich neither gave or promised him anything for it, and neither a court of equity or of law can recognize a *nudum pactum*.

And to say that Swain, by thus insuring, intended to release them from that duty, and to place himself in a position to be obliged to discharge the Milwaukie mortgage, is contradicted by all the facts of the case bearing upon the question. On the seventh of October, 1857, three days before he obtained the policies from Paine, he filed his bill of foreclosure in the state court of Michigan. —(p. 410.) This shows he had lost all confidence in Medbery and Aldrich. He charges (p. 408) that they

have neglected to insure the new saw-mill, as required by the mortgage, (p. 309,) or to pay the taxes, and that they are cutting off timber and committing waste on the mortgaged premises, (p. 408,) and were diminishing the value of the security. Of course, it would be absurd to suppose that Swain then contemplated doing any act towards discharging the Milwaukie mortgage. On the contrary, he states in his deposition, as well as his answer, that he was acting under that clause of his mortgage (p. 309) which gave him the positive right to insure the new saw-mill, or any other building on the premises, in case Medbery and Aldrich omitted to do so; and to charge the premium and the costs and charges over to the mortgage as an additional amount secured by it. This he did, and Carr and Aldrich paid him the amount for 1857 and 1858 on the twenty-seventh November, 1858.—(p. 131.) This he could not have done had he paid the premium, &c., voluntarily, and under his agreement, indorsed on the Milwaukie mortgage. Carr and Aldrich, the assignees of Medbery and Aldrich, however, made no objection, as they might and would have done had they supposed the amount was paid voluntarily under that agreement.

And the appellees themselves in their bill (p. 17) treat this payment *as one due* under *the mortgage from Medbery and Aldrich to Swain.* So that no ground is left to pretend that Swain "claimed the privilege" of insuring the mill. The appellees admit in their bill (p. 17) that he did it *under the mortgage* which, as we have seen, expressly gave him the right; and thus this pretence becomes inconsistent with the bill itself.

Swain's agreement related specially to the new saw-mill. Had it been carried out faithfully by Medbery and Aldrich, the mill properly erected and insurance upon it effected and delivered to him, such a performance of the agreement would, it may be conceded, have had the effect to annul the mortgage so far as *insurance* upon it was concerned; but so long as it remained unfulfilled in any re-

spect, there can be no doubt Swain's right to insure the mill and charge over the premium and costs, as provided in the clause referred to, remained undisturbed. Thus he viewed it, and thus the assignors of the appellees viewed it.

And the court will look to see with what intent and purpose the act was done.

Had the saw-mill been properly insured by Medbery and Aldrich, as required by Swain's agreement, at the time of the foreclosure sale, the security substituted for the Milwaukie mortgage would have been perfect, and the mill would have sold for a proportionally higher price than it did. Thus Swain has been plainly injured by their neglect to perform his agreement. Are their hands or those of their assignees clean? Surely not. They have not "done equity."

On the foreclosure sale the whole mortgaged property was sold for $19,600, leaving a balance of $2,864.11 due and unpaid, for which Swain has no security whatever but the Milwaukie mortgage. The appellees admit this fact, for they aver (p. 18, fol. 27) in their bill that Swain foreclosed the mortgage in the circuit court of Berrien county, and obtained a decree of sale, under which the property was sold for $19,600. They allege no illegality in the proceedings; at least they prove none. We produce the complete record of the case. As evidence, it is certainly conclusive in this case to show that the above balance of $2,864.11 is still due of the original indebtedness.

Will the court, upon such a state of fac[illegible] upon testimony so loose, improbable, and inconcl[illegible] specific performance of Swain's agreeme[illegible] the Milwaukie mortgage, and thus depriv[illegible] security?

The language of this court in Dorsey v[illegible] Howard, p. 137, applies strongly to th[illegible] They say "where the obligation is m[illegible]

have neglected to insure the new saw-mill, as required by the mortgage, (p. 309,) or to pay the taxes, and that they are cutting off timber and committing waste on the mortgaged premises, (p. 408,) and were diminishing the value of the security. Of course, it would be absurd to suppose that Swain then contemplated doing any act towards discharging the Milwaukie mortgage. On the contrary, he states in his deposition, as well as his answer, that he was acting under that clause of his mortgage (p. 309) which gave him the positive right to insure the new saw-mill, or any other building on the premises, in case Medbery and Aldrich omitted to do so; and to charge the premium and the costs and charges over to the mortgage as an additional amount secured by it. This he did, and Carr and Aldrich paid him the amount for 1857 and 1858 on the twenty-seventh November, 1858.—(p. 131.) This he could not have done had he paid the premium, &c., voluntarily, and under his agreement, indorsed on the Milwaukie mortgage. Carr and Aldrich, the assignees of Medbery and Aldrich, however, made no objection, as they might and would have done had they supposed the amount was paid voluntarily under that agreement.

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And the court will look to see with what intent and purpose the act was done.

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Will the court, upon such a state of facts—upon testimony so loose, improbable, and inconclusive—order a specific performance of Swain's agreement to discharge the Milwaukie mortgage, and thus deprive him of his last security?

The language of this court in Dorsey vs. Packwood, 12 Howard, p. 137, applies strongly to the present case. They say "where the obligation is mutual, the party

asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt, and eager to perform the contract. If he has been guiity of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed."—(See also 1 Story's Eq., § 771.) Sugden says, "In equity the most unequivocal proof of a parol variation will be expected."—(1 Sug. on Vendors, 7th Am. Ed., p. 199.)

J. M. HOWARD,
Of counsel for appellant.

Supreme Court of the United States.

DECEMBER TERM, 1869.—No. 20.

ISAAC N. SWAIN, Defendant and Appellant,

vs.

STEPHEN H. SEAMAN, CATHARINE M. STEVENS, and EDWARD P. WHALING, Complainants and Respondents.

RESPONDENTS' BRIEF.

MATT: H. CARPENTER,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

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ISAAC N. SWAIN, Defendant and Appellant,

vs.

STEPHEN H. SEAMAN, CATHARINE M. STEVENS, and EDWARD P. WHALING, Complainants and Respondents.

Appeal from the Circuit Court of the United States for the District of Wisconsin.—In Equity.

This suit was commenced in the State court of Wisconsin, under the laws of that State, to compel the defendant, Swain, to cancel a certain mortgage on real estate in Milwaukee, Wisconsin; and was removed by the defendant—a citizen of the State of Michigan—to the circuit court of the United States for the district of Wisconsin, where, upon a full hearing on the merits, the court rendered the decree prayed for by the bill; from which decree the defendant, Swain, appeals to this court.

It is shown by the bill, and admitted by the answer, that John W. Medbery and James F. Aldrich purchased certain real estate from Swain, lying in the State of Michigan; the purchase price amounting to $52,400; that they paid down the sum of $10,000, and gave a bond for the balance, secured by a mortgage on the purchased premises; and, as collateral security, the said John W. Medbery and wife executed and delivered to Swain a mortgage, which this bill is exhibited to cancel, upon certain real estate in Milwaukee, Wisconsin,

conditioned to secure the bond given for the balance ($42,000) of purchase-money; but that Swain executed, upon the back of the mortgage, an agreement, as follows:

"It is hereby stipulated and agreed, by the said party of the second part within named, that if, within two years from this date, the large saw-mill, fifty by one hundred and fifty feet in size, shall be properly built and completed upon the foundation commenced last fall, by driving piles, which is on the premises described in said mortgage, mentioned as being executed by the said John W. Medbery and James F. Aldrich and their wives, to accept, in place of the within mortgage, security in proper fire insurance policy or policies on said large saw-mill, and *thereupon to discharge the within mortgage*, to which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself, his heirs, executors, administrators, and assigns.

"Dated April 14, 1855. ISAAC N. SWAIN." [L. S.]

His agreement upon the back of the mortgage was "an agreement concerning real estate," within the meaning of the statutes of Wisconsin, and was executed and acknowledged, so as to be entitled to registration; and was in fact recorded with and as a part of the mortgage; so it became notice to all subsequent purchasers.

R. S. Wis., 1858, chap. 87, p. 544.
Bill, Record, 15, 16.
Answer, Record, 33, 34.

The complainants subsequently purchased the property conveyed by this mortgage in Wisconsin, believing that the provisions of the agreement had been observed by Medbery & Aldrich, and that they were entitled to have the mortgage cancelled.

The bill further states that Medbery & Aldrich did substantially perform, by building a mill on the foundation aforesaid, which was of greater value, though of different dimensions, than the one contemplated by the agreement; that Swain consented to or acquiesced in the variation from the original plan; and that, after the mill was completed, Swain accepted policies of insurance obtained thereon as a com-

pliance with the agreement by Medbery & Aldrich. The answer denies that Medbery & Aldrich completed the mill substantially according to the agreement; denies that Swain consented to or acquiesced in the departure from the plan for constructing the mill; and, admitting that Swain did accept policies of insurance upon the mill which was built, denies that he did so in pursuance of the agreement, or that he accepted the policies as a compliance on the part of Medbery & Aldrich.

This case, therefore, depends upon the following questions:

(1.) Was the mill constructed in substantial conformity with the agreement?

(2.) If constructed differently, did Swain consent to or acquiesce in the departure from the original plan; or

(3.) Did Swain, after its construction, accept policies on the mill in pursuance of the agreement?

If either of these questions can be answered in the affirmative, then the mortage should be cancelled, and, of course, the decree must be affirmed; if not, then the decree must be reversed.

I.

As the complainants do not claim that the mill was constructed in the precise form mentioned in the agreement, it becomes necessary to inquire, *what was the spirit of that agreement*, and whether it has so far been observed as to entitle the parties interested to claim the benefit of the agreement against Swain. The agreement speaks of a mill to be constructed "fifty by one hundred and fifty feet in size;" the mill actually constructed was seventy-eight by one hundred feet. But the complainants contend that this was a substantial compliance with the agreement, and that Swain accepted it as such, by accepting the policies of insurance obtained thereon; and that he is estopped to object to the dimensions of the mill, when called upon to cancel the mortgage.

Substantial performance is all that is required to satisfy any agreement.

"The only general rule is, that the performance must be such as is required by *the true spirit and meaning* of the contract, and the intention of the parties as expressed therein. A mere literal accurate performance may wholly fail to satisfy the true purpose of the contract."

2 Pars. Cont., p. 168.

What, then, was the *true spirit* of this agreement? What benefit was designed to be conferred upon Swain, as the inducement to his cancelling this mortgage?

It is obvious that the only interest Swain had in the agreement was to obtain *security*.

There was a contract of sale from Swain to Medbery & Aldrich, and the intention of the parties was to pass the title and the beneficial use of the premises forever from Swain. He had no other object in view than to obtain security.

By the contract of sale (Record, 302) $6,666 66 was to be secured upon other property; and it was in pursuance of this contract, as Swain himself testifies, that the Wisconsin mortgage was given. In ascertaining the real intention of the parties, the contract of purchase, the Wisconsin mortgage, and this agreement endorsed upon the mortgage, should be considered together; and from them all it is evident the parties intended that the Wisconsin mortgage should be released when the mill was constructed and insurance obtained thereon to the amount of $6,666 66. Suppose a mill had been constructed upon that foundation fifty by one hundred and fifty feet, and perhaps worth less than $1,000, would that have been a compliance with the spirit of the contract of sale and the agreement endorsed on the Wisconsin mortgage, when construed together? Clearly not. It is certain that the parties looked to the construction of a mill of the value of $6,666 66 and the policies thereon, as security in place of the Wisconsin mortgage, which, by the terms of the contract of sale, was to secure this $6,000. Nothing short of a mill which could be insured to that amount would have satisfied

the spirit of the agreement, because nothing short of this would have realized the expectations of Swain and the intention of Medbery & Aldrich, as shown by the contract and the agreement, construed together. The precise dimensions of the mill were of no consequence to Swain, its value everything; because upon its value depended his security, which was the subject of the agreement. Yet the literal requirements of the agreement would have been satisfied by the construction of a mill of any value, or even of no value, provided it were fifty by one hundred feet, for this is the only specification in the agreement in regard to the mill.

If it be true that a worthless mill, fifty by one hundred feet, would not have satisfied the spirit of the agreement, for the reason above, then it must follow that a mill of any dimensions, but of value sufficient to support an insurance equal to $6,666 66, would have satisfied the agreement. In other words, the true spirit of the contract, so far as regards Swain, was *value*, not *form;* and, if the mill actually constructed was of value greater than one constructed fifty by one hundred feet would have been, and it could be insured to the amount of $6,666 66, then such mill satisfied the agreement in its true spirit and according to the intention of the parties therein expressed.

The deposition of the defendant, Swain, (Rec., p. 242,) is conclusive of the intention of the parties in making the agreement on the back of the mortgage, that is, to give the defendant security by policies of insurance on the mill. Swain's own account of the conversation between himself and Medbery shows that nothing but *security* was *talked* of. He tries, as an after-thought, to make out that he had a purpose in drafting that agreement, which was not known to the other parties, and therefore constituted a fraud upon them, if the contract is to be construed as he contends. He says (Rec., p. 242) "this defendant, then, knowing that he *had failed to obtain*, in writing, *a recognition of their obligation to build the said new saw-mill, and to confine them to both the size and particular location*, as commenced the fall previous, &c., *and thinking that this would be a good opportunity to do so*, thereupon hastily wrote

a conditional agreement," &c., which was endorsed on the mortgage, and executed and acknowledged by Swain. Swain does not pretend that the other parties to the agreement had any such thing in view. On the contrary, he now pretends that he was playing a trick and a fraud upon them, and thus incidentally binding them to do what they did not intend to be bound for. The contract was, in this light, and with this construction, no contract at all, because the minds of the parties never met upon such a proposition.

In Jordan *vs.* Dyer, 34 Vt., 106, the court say:

"We regard it as a rule of law, no less than of morals, that whatever is expected by one party to a contract, *and known to be so expected by the other*, is to be deemed a part or condition of the contract."

Swain knew that Medbery & Aldrich would not be bound to any particular dimensions in constructing the mill; and knowing how they understood the contract, Swain is estopped to claim it to be different. This contract would be a fraud upon them if construed as Swain now contends it should be; and a *literal* completion of the contract would be a thing never contemplated by all the parties; a thing upon which their minds never met.

Of course neither party can add to or take from the legal effect of this contract by parol; but the testimony of Swain shows how unjust, how utterly opposed to the understanding of the parties, would be the construction for which he contends.

2. The testimony clearly shows, that the mill which was constructed was more valuable than it would have been if constructed fifty by one hundred feet, and that the change in the form of the mill was made for that reason, upon the advice of mechanics and experts. The mill as constructed was three hundred square feet larger than the one contemplated, cost twice as much money, and was every way better. Its value, actual cost, was from $33,000 to $35,000.

See deposition of James F. Aldrich, R., 92, 93, 97.
" Medbery, R., 127.
" Miller, R., 140.
" Stewart, R., 110, 111.

II.

Again, Swain consented to or acquiesced in the change that was made.

Aldrich testifies (Rec., 93, and again 97) that the change in form was made only to get a better mill; that it was advised by their superintendent and mill-wright; and he says: "*I talked to the defendant relative to the change of size; he expressed himself satisfied, and in no way demurred, but said he thought it would cost more money.*" Stewart testifies, (Rec., 141,) that the mill of dimensions mentioned in the contract would have cost about $16,000, and that the mill which was built cost about $33,000. Miller testifies (Rec., 142) that Swain was about the mill, and once in the mill while it was being constructed, and never made any objection to it to his knowledge.

Stewart testifies, (Rec., 112, 113.)

"In the forepart of the month of May, 1856, but on what particular day of that month he does not now recollect, he, together with the above-named John W. Medbery, the defendant, Isaac N. Swain, and Henry A. Miller, the machinist who put in the machinery into the saw-mill for Medbery & Aldrich, were present at the said saw-mill, and that they each and all of them went in and around and through every part of said mill, and inspected and examined the timbers, machinery, gearings, platforms, and every part of the building which was there, very nearly and almost entirely completed, a portion of it having previously been completed and put in running order; and as the inspection of it was so being made by the said parties, *the attention of the said Swain was called by the said Medbery to the change of the size of the dimensions of the mill from fifty feet by one hundred and fifty feet to that of seventy-eight by one hundred feet*, and the reasons assigned by Medbery why it was made, and the necessity for such change, and the said Miller also explained and pointed out to said Swain, while the inspection of the gearing and machinery was thus being made, the benefits that would result from, and the necessity of the change, and the advantages that would result from the change; and after the inspection and examination had been gone through with, and the explanations given, and the reasons assigned for the changes thus made in the erec-

tion of the mill, *the said Swain was asked by the said Medbery if he was satisfied with the change that had been made, and was willing to consent thereto; and that said Swain replied that he was, and that he, the said Stewart, did not hear the said Swain make the least objection thereto*, and that he has no recollection of hearing the said Swain, at that time, make any objection to the condition in which the shop of his mate brother was left, or to the location upon which it had been placed."

Medbery testifies, (Rec., 127, 128.)

"About the time of the completion of the mill as built by myself and Aldrich, in the month of May or June, in the year 1856, I had a conversation with the said defendant, Isaac N. Swain, in relation to the change of the first plan of the said mill; the conversation took place in the mill at Watervliet, Michigan. J. S. Stewart and Mr. Miller were present with myself and the defendant. Mr. Miller and myself explained to the defendant the advantages of the change in the plan or dimensions of the mill, and the reason of such change. We all examined the mill through thoroughly in every part. After we had completed said inspection, I asked the defendant, Mr. Swain, if he was satisfied with the change as made, and was willing to consent to it, and *he replied that he was*. Some other general conversation took place in regard to the additional cost of the mill, the particulars of which I do not remember. The defendant in that interview made no objection to the change in the plan and dimensions of the saw-mill."

All the pretended conflict of evidence upon this point, apart from the testimony of Swain, depends upon a date. Our witnesses say that they think the interview was in May; and Swain attempts to prove that he went East *before* the 1st of May. The date is immaterial; and though the witnesses may be mistaken as to that, it is not to be inferred that they have committed deliberate perjury as to the conversation itself.

III.

DID SWAIN OBTAIN THE POLICIES OF INSURANCE *so as to be bound to cancel the Wisconsin mortgage?*

The principal mortgage given by Medbery & Aldrich on the Michigan property, the mortgage given by Medbery and

wife on the Wisconsin property, and the agreement endorsed by Swain on the Wisconsin mortgage, are all dated April 14, 1855, and constitute, as the proof shows, parts of one entire transaction. They are therefore to be construed together.

By the principal mortgage, Medbery & Aldrich agreed (Record, 309) to keep the property—including the new saw-mill to be built—insured; and it was provided that in case they failed to do so, Swain might insure the same at the cost of Medbery & Aldrich, and the charges and premium should be added to, and considered a part of, the debt secured by the mortgage. By the contract endorsed on the Wisconsin mortgage, Swain agrees that, when the mill is completed, he will accept policies of insurance upon the mill, and discharge the Wisconsin mortgage.

From these two provisions read together, the intention of the parties is plain. The Wisconsin mortgage was intended to remain until Swain should obtain his security upon the new mill, then it was to be cancelled. Now, we submit, that when the mill was completed, and Swain had policies of insurance upon the mill, it became his duty to discharge the Wisconsin mortgage without regard to whether Medbery & Aldrich had obtained the policies and assigned them to Swain, or Swain had obtained them himself, charging the cost and premium to Medbery & Aldrich, as he was authorized to do by the Michigan mortgage; because in either event *Swain had the security* upon which that mortgage was to be discharged. The mere matter of the premium being advanced by Medbery & Aldrich, or by Swain, and by him charged to Medbery & Aldrich, was too trifling a matter to be regarded as the essence of the agreement. Upon the policies when obtained *he was to rely for his security* and cancel the Wisconsin mortgage.

R. C. Paine (Rec., 75) testifies, that he is an insurance agent; has the books of the Ætna Insurance Company at Niles, Michigan, for the year 1856, and that the books show that a policy was issued to Medbury & Aldrich May 30, 1856, No. 371, for $2,000 on the saw-mill, and that notice was given

of a policy of $2,000 on the saw-mill by the Washington Union Insurance Company, and also notice of another policy on the saw-mill for $2,000 in the Jackson Mutual Insurance Company; that as agent for the Ætna Insurance Company at Niles, Michigan, on the 10th October, 1857, he issued for the benefit of Swain to the amount of $5,500 on the property in Michigan, $1,500 being on the saw-mill, and notice was given at this time of policy for $3,000 on the saw-mill in the Washington Union Insurance Company, and $1,500 in the Phœnix Insurance Company on the saw-mill. This policy was numbered 441, and the premium paid by Swain—premium, $175 50. And on page 71 he says, *he derived this knowledge of the prior insurance from Swain.* That is, in 1857 Swain held policies on the mill as follows:

Phœnix Company	$1,500 00
Washington Union	3,000 00
Ætna	1,500 00
	$6,000 00

Aldrich (Rec., 93) testifies that in the spring of 1856 three policies of insurance were obtained on the mill, amounting to "six hundred," meaning six *thousand* dollars, which he delivered to Swain, which he says were "accepted by the defendant without objection."

That he procured one or more policies on the mill in 1857 or 1858, but did not procure more, because Swain asked the privilege of obtaining other insurance for himself, which request was granted, and Swain procured policies for himself, on which the premiums were subsequently paid by him, Aldrich; and that this was the only reason that Medbery & Aldrich did not procure others themselves.

Stewart (Rec., 112) says, that he acted as agent for Medbery & Aldrich, and obtained, in May, 1856, for them three policies of insurance, as follows:

Ætna	$2,000	
Washington Union	2,000	
Jackson Mutual	2,000	
		$6,000

That he sent these policies to Aldrich in Chicago, in May, 1856. And Aldrich testifies (Rec., 102) that he kept these policies several months, and delivered them to Swain, in Chicago, the first time he saw him, in September or October, 1856. (Rec., 102.)

Record, 130, 131, shows that Swain charged Medbery & Aldrich for the money paid by him for insurance as follows:

Oct. 12, 1857. To insurance premium, paid R. C. Paine----	$236 50		
Sept. 18, 1858. Int. on this premium----	15 92		
Nov. 27, 1858. Int. on above amount--	4 13		
		$256	55
Sept. 27, 1858. Ins. premium, paid in New York, for $6,000 insurance----------	210 00		
Nov. 27, 1858. Int. on this sum--------	3 50		
		213	50
Total----------		$470	05

This sum was paid to Swain and accepted by him. (Rec. 133.)

Swain admits that, in 1858, he procured $6,000 insurance on the saw-mill in New York; and this account shows that Medbery & Aldrich paid the premium. He *then* had the security upon which he was bound to cancel the mortgage, by his own testimony.

The fearful extortion which Swain is attempting entitles him to no special favor at the hand of a court of equity.

The purchase price of this property was $52,400.

Medbury & Aldrich paid down.....	$10,000
They paid November 27, 1858, (Rec., 133,)	15,236
The improvements cost over----------	33,000
Other payments, (Rec., 133)----------	3,000
	$61,236

Swain has foreclosed his Michigan mortgage, purchasing the property and improvements, has a decree for deficiency, and now proposes to foreclose the Wisconsin mortgage. No court is bound to do any violence to law or fact to aid such oppression.

IV.

It is well settled that a written or sealed instrument may be varied as to the time or manner of its performance, or may be waived altogether by a subsequent parol agreement.

Goss *vs.* La. Nugent, 5 B. & Adol., 65.
Keating *vs.* Price, 1 Johns. Cases, 22.
Cuming *vs.* Arnold, 3 Met., 486; and cases cited by the court.
Ewin *vs.* Sanders, 1 Cow., 249.
Blood *vs.* Enos, 12 Vt., 625.
Robinson *vs.* Bachelder, 4 N. H., 40.
Grafton Bank *vs.* Woodward, 5 N. H., 99.
Richardson *vs.* Hooper, 13 Pick., 446.
Ratcliffe *vs.* Pemberton, 1 Esp., 35.
Fleming *vs.* Gilbert, 3 Johns., 528; and cases cited by Thompson, J.
Porter *vs.* Stewart, 2 Aik., 417.
Cabe *vs.* Jameson, 10 Iredell, 193.
Reed *vs.* Grew, 5 Ohio, Ham., 375.

In Monroe *vs.* Perkins, (9 Pick., 298,) in which it was held, "a contract under seal may be waived by a parol agreement." The court, speaking of the cases in relation to mere written instruments, say, page 305: "The distinction taken in the argument, between contracts in writing merely and contracts under seal, appears by the authorities not to be important as it respects the point under consideration, and justice required in the present case that the parol evidence should be received."

The doctrine of equitable estoppel, as applied in all the modern cases, precludes Swain, after standing by and wit-

nessing the completion of the mill with its actual dimensions, from objecting to cancel the mortgage upon the ground of change in the plan.

"Where a person tacitly encourages an act to be done, or consents to it, he cannot afterwards exercise *his legal right* in opposition to such consent." (Morris Canal Co. *vs.* Lewis, 1 Beasley, N.J., 323.) And this doctrine is applied in all cases, and precludes a party from claiming under a deed, or setting up title by deed which is of record to himself, where he has by word or act given others reason to believe he had no right, or intended to waive it, and they would be prejudiced by his asserting his right.

Blackwood *vs.* Jones, 4 Jones Eq., (N. C.,) 54.
Chiappella *vs.* Brown, 14 La. An., 189.
Bleven *vs.* Freer, 10 Cal., 172.
Snodgrass *vs.* Ricketts, 13 Cal., 359.
Cochran *vs.* Harrow, 22 Ill., 345.
Davis *vs.* Handy, 37 N. H., 65.
Tilton *vs.* Nelson, 27 Barb, 595.
Corbell *vs.* Norcross, 35 N. H., 99.
Funk *vs.* Newcomer, 10 Md., 301.
Nixon *vs.* Carco, 28 Miss., 414.
Gatling *vs.* Rodman, 6 Ind., 289.
Wells *vs.* Pierce, 7 Foster, (N. H.) 503.
Strong *vs.* Ellsworth, 26 Vt., 366.
Carey *vs.* Wheeler, 14 Wis., 281, and cases cited in the opinion of the court.

There can be no doubt, I think, from all the testimony, that Swain was content with the mill and with the insurance, until afterwards, when Medbery & Aldrich failed; and then he determined to sweep everything into his own pocket.

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